Supreme Court, U.S.
FILED

97 1570 MAR 23 1998

OFFICE OF THE CLERK

No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Petitioner,

v.

NATIONAL PRIVATE TRUCK COUNCIL, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

SCOTT HARSHBARGER
Attorney General
of Massachusetts

THOMAS A. BARNICO*
Assistant Attorney General
1 Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200, ext. 2086
**Counsel of Record*

43 pp

Question Presented

Whether P.L. 86-272, 15 U.S.C. § 381 (1994), exceeds the power of Congress to "regulate commerce" under the Commerce Clause or violates principles of federalism embodied in the Tenth Amendment to the United States Constitution, by substantially impairing the right of a State to impose a non-discriminatory and fairly apportioned tax on interstate commerce within its borders.

Parties to the Proceeding

The plaintiff-respondent is National Private Truck Council, Inc. The defendant-petitioner is the Commissioner of Revenue of the Commonwealth of Massachusetts.

Table of Contents.

QUESTION PRESENTED

PARTIES TO THE PROCEEDING

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

Prior Proceedings 5

Statement of Facts 6

REASONS FOR GRANTING THE WRIT 8

I. THE CONSTITUTIONALITY OF P.L. 86-272 IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.. 9

A. *Public Law 86-272 Nullifies the Right of the States to Impose Non-Discriminatory, Fairly Apportioned Taxes on Interstate Commerce Within Their Borders.* 9

B. *Public Law 86-272 Exceeds Congress's Power Under the Commerce Clause and Violates the Tenth Amendment Because It Unduly Restricts the Power of the States to Impose Non-Discriminatory and Fairly Apportioned Taxes on Interstate Commerce Within Their Borders.* . . 12

CONCLUSION 23

APPENDIX

Table of Authorities.

Cases.

Aloha Airlines v. Director of Taxation of Hawaii, 464 U.S. 7 (1983) 17

Arkansas v. Farm Credit Services, 116 S. Ct. 1776 (1997) 15

Arizona Pub. Serv. Co. v. Snead, 441 U.S. 141 (1979) 18

Brown-Forman Distillers Corp. v. Collector of Revenue, 101 So.2d 70 (La. 1958), *appeal dismissed*, 359 U.S. 28 (1959) 10

Commissioner of Revenue v. Kelly-Springfield Tire Co., 419 Mass. 262, 643 N.E.2d 458 (1994) 16

Commonwealth of Virginia, Dep't of Taxation v. National Private Truck Council, 480 S.E.2d 500 (Va. 1997) 9n

Dep't of Rev. of Oregon v.
ACF Industries, Inc.,
510 U.S. 332 (1994) 17

Dows v. City of Chicago,
78 U.S. (11 Wall.) 108 (1871) 15

Fair Assessment in Real Estate
v. McNary,
454 U.S. 100 (1981) 14

Franchise Tax Bd. of Calif. v.
Construction Laborers Vacation Trust,
679 F.2d 1307 (9th Cir. 1982),
vacated on other grounds,
463 U.S. 1 (1983) 20

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 (1824) 14

Heublein, Inc. v. South Carolina
Tax Commission,
409 U.S. 275 (1972) 10, 11, 20

H.P. Hood & Son v. DuMond,
336 U.S. 525 (1949) 18

An Information Against Bates,
Lane's Reports 23,
English Reports (Exchequer)(1606) 14n

In Re Brentwood Outpatient, Ltd.,
43 F.3d 256 (6th Cir. 1994),
cert. denied, 514 U.S. 1096 (1995) 20

International Shoe Co. v. Cocreham,
164 So.2d 314 (La.),
cert. denied, 379 U.S. 902 (1964) 12

International Shoe Co. v. Fontenot,
107 So.2d 640 (La. 1958),
cert. denied, 359 U.S. 984 (1959) 10

Kennametal, Inc. v. Commissioner of Revenue,
426 Mass. 39, 686 N.E.2d 436 (1997),
petition for cert. pending,
U.S. Sup. Ct. No. 97-1242 16

McKesson v. Division of Alcoholic
Beverages & Tobacco,
496 U.S. 18 (1990) 14, 15

Metcalf & Eddy v. Mitchell,
269 U.S. 514 (1926) 21

Moorman Mfg. Co. v. Blair,
437 U.S. 267 (1978) 18

New York v. United States,
326 U.S. 572 (1946) 21

New York v. United States,
505 U.S. 144 (1992) 13

Northwestern States Portland Cement Co. v. Minnesota,
358 U.S. 450 (1959) 10, 11, 13, 16, 20, 22n

Prudential Insurance Co. v. Benjamin,
328 U.S. 408 (1946) 18n

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) 18n

Smith Kline & French Laboratories v. State Tax Comm'n,
1964 WL 134 (Or. Tax Ct.), *rev'd*,
403 P.2d (Or. 1965) 13

Southeastern Pa. Trans. Auth. v. Pennsylvania Pub. Util. Comm'n,
826 F. Supp. 1506 (E.D. Pa. 1993) 19n

State Board of Tax Commissioners of Indiana v. Jackson,
283 U.S. 527 (1931) 14

State ex. rel. CIBA Pharmaceutical Products, Inc. v. State Tax Commission,
382 S.W.2d 645 (Mo. 1964) 12

State of Arizona v. Atchison, Topeka, & Santa Fe Railroad Co., 656 F.2d 398 (9th Cir. 1981) 17

United States v. Lopez, 514 U.S. 549 (1995) 13, 15

Western Airlines, Inc. v. Board of Equalization of South Dakota, 480 U.S. 123 (1987) 17

Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214 (1992) 10, 11, 16

United States Constitutional Provisions.

Art. I, § 8 (Commerce Clause) 2, 13

Tenth Amendment 2, 13, 20, 22

Twenty-First Amendment 20

Federal Statutes.

4 U.S.C. § 111 (1994) 19

Public Law 86-272,
15 U.S.C. § 381 (1994) . . . . . *passim*

Railroad Revitalization and
Regulatory Reform Act of 1975,
Pub. L. No. 94-210, § 306, 90 Stat. 31,
49 U.S.C. § 11503(b)(4)(1994) 17

Tax Reform Act of 1976,
Pub. L. No. 94-455, § 2121(a),
90 Stat. 521,
15 U.S.C. § 391 (1994) 18

28 U.S.C. § 1257(a) (1994 ed.) 2

28 U.S.C. § 2403(a) (1994 ed.) 2

31 U.S.C. § 3124 (1994 ed.) 19

49 U.S.C. App. § 1513(d)(1)(A)-(C)
(recodified at
49 U.S.C. § 40116 (1994)) 18

49 U.S.C. § 40116(f) (1994) 18

Federal Legislative Materials.

H. 1054 (1997) 21

H.R. Rep. No. 936,
86th Cong., 1st Sess. (1959) 10

S. Rep. No. 658,
86th Cong., 1st Sess.,
reprinted in 1959
U.S.C.C.A.N. 2548 . . . . . 10, 11, 17, 20

Massachusetts Statutes.

M.G.L.A. c. 14, §§ 1-3 (West 1994 ed.) 6

M.G.L.A. c. 62C, § 3 (West 1988 ed.) 7

M.G.L.A. c. 63, § 39 (West 1997 Supp.) 4, 7

Massachusetts Regulations.

830 C.M.R. § 39.1(5)(a) (1993) 5, 7

Miscellaneous.

A. Hamilton,
The Federalist,
No. 33 (Rossiter ed. 1961) 14, 17

J. & W. Hellerstein,
State Taxation,
(2d ed. 1993) 8, 12, 15

U.S. Supreme Court Rule 10(c) 9

U.S. Supreme Court Rule 12 1

U.S. Supreme Court Rule 13 1

U.S. Supreme Court Rule 14 1

U.S. Supreme Court Rule 29.4(b) 2

NO. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Petitioner,

v.

NATIONAL PRIVATE TRUCK COUNCIL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rules 12, 13, and 14, defendant Massachusetts Commissioner of Revenue requests that the Court issue a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts entered on December 22, 1997.

OPINIONS BELOW

The opinion of the Supreme Judicial Court is reported at 426 Mass. 324 and 688 N.E.2d 936 (1997) and is reproduced in the Appendix hereto. The decision of the Massachusetts Superior Court is not reported but is reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Massachusetts Supreme Judicial Court was entered on December 22, 1997. No rehearing was sought. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a)(1994). In light of the fact that petitioner has drawn into question the constitutionality of an Act of Congress, and neither the United States nor any federal department, office, agency, officer, or employee is a party, 28 U.S.C § 2403(a) (1994) may apply, and petitioner has accordingly notified the Solicitor General of the United States of this petition, as required by U.S. Supreme Court Rule 29.4(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. I, § 8

The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several States . . . .

United States Constitution Amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Public Law 86-272,
15 U.S.C. § 381 (1994)

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to -

> (1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

Mass. Gen. Laws Ann. ch. 63, § 39
(West 1997 Supp.)

Except as otherwise provided herein, every foreign corporation, exercising its charter, or qualified to do business or actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth, shall pay, on account of each taxable year, the excise provided in subsection (a) or (b) of this section, whichever is greater.

The excise levied herein is due and payable on any one or all of the following alternative incidents:

(1) The qualification to carry on or do business in this state or the actual doing of business within the commonwealth in a corporate form. The term "doing business" as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in the commonwealth, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services or property.

> (2) The exercising of a corporation's charter or the continuance of its charter within the commonwealth.
>
> (3) The owning or using any part or all of its capital, plant or other property in the commonwealth in a corporate capacity.
>
> It is the purpose of this section to require the payment of this excise to the commonwealth by foreign corporations for the enjoyment under the protection of the laws of the Commonwealth, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation. . . .

STATEMENT OF THE CASE

Prior Proceedings

In this action National Private Truck Council (NPTC) claims that a regulation issued by the Massachusetts Commissioner of Revenue is preempted by Public Law 86-272, 15 U.S.C. § 381. The Massachusetts regulation, 830 Code of Massachusetts Regulations (C.M.R.) § 39.1(5)(a) (1993), applies the Massachusetts corporate excise tax to foreign (non-Massachusetts) corporations that sell tangible personal property to customers in Massachusetts and deliver such property to their customers in trucks owned or leased by such corporations or their affiliates. Public Law 86-272 purports to limit the authority of the States to tax such interstate commerce, even

where the State tax is non-discriminatory, fairly apportioned, and based on a substantial nexus between the taxpayer and the taxing state.

The Massachusetts Superior Court decided the case on cross-motions for summary judgment, affidavits, and a statement of agreed facts. Pet App. 2. The court held that the Regulation was preempted by P.L. 86-272, to the extent that it imposed a tax on companies that did no more than solicit orders in Massachusetts and deliver the ordered goods to customers there in company-owned trucks. *Id.* The court rejected the Commissioner's claim that P.L. 86-272 is an unconstitutional limit on the authority of a State to impose a non-discriminatory and fairly apportioned tax on interstate commerce within its borders. *Id.*

The Massachusetts Supreme Judicial Court affirmed. Pet. App. 2. On the constitutional issue, the court stated that "Congress's plenary power to regulate interstate commerce is well established . . . [and,][c]onsistent with this power, Congress can prohibit States from imposing taxes that interfere with interstate commerce." *Id.* at 7 (citations omitted). The court described P.L. 86-272 as "a uniform minimum standard which must be met before a State may tax interstate commerce." Pet. App. 8 (citations omitted). "This," the court concluded, "is clearly within the ambit of Congress's commerce power." *Id.* (citations omitted).

Statement of Facts

The material facts in this case were stipulated or not disputed below. Pet. App. 2. The Commissioner is the Massachusetts official authorized to administer and enforce the state's tax laws. M.G.L.A. ch. 14, §§ 1-3 (West 1994);

M.G.L.A. ch. 62C, § 3 (West 1988). Among his duties is the enforcement of the corporate excise imposed on foreign corporations doing business in Massachusetts by M.G.L.A. ch. 63, § 39. "The Commissioner may prescribe regulations and rulings, not inconsistent with law, to carry into effect the provisions of . . . [M.G.L.A. ch. 63, § 39] . . . ." M.G.L.A. ch. 62C, § 3.

The Regulation at issue exempts non-Massachusetts corporations from the excise tax

> if the sole activity of the corporation in Massachusetts is the solicitation by the corporation's representatives of orders for the sale of tangible personal property, provided that the orders are sent outside Massachusetts for approval or rejection, and provided that the orders are filled by shipment or delivery by common carrier or contract carrier from a point outside of Massachusetts.

803 C.M.R. § 63.39.1(5)(a).

NPTC is "the national trade association representing the interests of approximately 1,000 corporations . . . that operate truck fleets in support of their respective business activities." R.A. 92. "NPTC's members include large fleets operated by Fortune 500 companies as well as the small fleets of local businesses." R.A. 93. "They operate virtually every type of trucking equipment, including tractor-trailer combinations, tank trailers, and forty-eight or fifty-three foot long trailers, and straight trucks used in local delivery operations by businesses such as bakeries and dairies." R.A. 93. NPTC members distribute their goods nationwide or in a multistate area. *Id.*

The parties stipulated that some NPTC members (including both parent companies and trucking subsidiaries) regularly transport their goods from points outside Massachusetts to Massachusetts in vehicles owned or leased by them. R.A. 94. Some members do so at least eight days per month. *Id.* Some members also pick up goods in Massachusetts and deliver them outside Massachusetts. *Id.* Two foreign companies that have invoked P.L. 86-272 and claim the same immunity claimed by NPTC transport goods to Massachusetts in company trucks more than 300 days per year. R.A. 98-99.

The record also includes undisputed evidence about the impact of P.L. 86-272 on the collection of state taxes on interstate commerce. An affidavit of a Massachusetts tax official states that for fiscal years 1993 and 1994, the Department of Revenue assessed taxes or notices of intention to assess taxes in 1,580 cases in which taxpayers invoked P.L. 86-272, totaling $29,578,207. R.A. 43-44.

REASONS FOR GRANTING THE WRIT

Public Law 86-272 represents the "first time in our history" that Congress "enacted general legislation restricting the powers of the States to tax interstate business." J. & W. Hellerstein, *State Taxation,* Vol. I, ¶ 6.10 at 6-23 (2d ed. 1993). As discussed below, later federal statutes have restricted certain state taxes in other circumstances, *e.g.*, to prevent discrimination, promote fair apportionment, or protect federal employees or instrumentalities. However, P.L. 86-272 arguably stands alone as a general prohibition on a non-discriminatory, fairly apportioned state tax that otherwise satisfies the Constitution. This Court has never considered the

constitutionality of P.L. 86-272. The Supreme Judicial Court has accordingly "decided an important question of federal law that has not been, but should be, settled by this Court . . . ." United States Supreme Court Rule 10(c).[1]

I. THE CONSTITUTIONALITY OF P.L. 86-272 IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

A. *Public Law 86-272 Nullifies the Right of the States to Impose Non-Discriminatory, Fairly Apportioned Taxes on Interstate Commerce Within Their Borders.*

Public Law 86-272 nullifies the right of the States to impose a tax on interstate commerce where that tax is concededly non-discriminatory and fairly apportioned and is based on constitutionally adequate contacts between the taxpayer and the taxing State.

The history and terms of P.L. 86-272 show its dramatic purpose and effect. The statute was enacted in response to three

---

[1] Massachusetts does not seek a writ of certiorari on that part of the judgment below that held that P.L. 86-272 preempts Massachusetts from imposing its corporate excise tax on companies that do no more than solicit orders in Massachusetts and deliver the ordered goods to customers there in company-owned trucks. On that issue, the decision of the Supreme Judicial Court is consistent with the decision in *Commonwealth of Virginia, Dep't of Taxation v. National Private Truck Council*, 480 S.E.2d 500 (Va. 1997). *See* Pet. App. 5-6.

decisions of this Court in 1959. Prior to 1959, there was considerable doubt whether a State could tax a foreign corporation solely on the basis of its solicitation of orders for its products in the taxing State. In 1959, however, the Court held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 452 (1959). While *Northwestern States* involved state taxation of a corporation whose activities in the taxing State exceeded solicitation, the Court's denial of review of two Louisiana decisions raised concerns among businesses that the quoted language from *Northwestern States* would permit state taxation of out-of-state corporations on the basis of mere solicitation in the taxing State. Both *Brown-Forman Distillers Corp. v. Collector of Revenue*, 101 So.2d 70 (La. 1958), *appeal dism'd*, 359 U.S. 28 (1959), and *International Shoe Co. v. Fontenot*, 107 So.2d 640 (La. 1958), *cert. denied*, 359 U.S. 984 (1959), involved Louisiana decisions upholding state net-income taxes on out-of-state corporations whose activities in Louisiana were limited to the solicitation of orders. *See generally Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 220-221 (1992). Congress "promptly responded to the 'considerable concern and uncertainty' and the 'serious apprehension in the commercial community' generated" by *Northwestern States* by enacting P.L. 86-272 within seven months of the decision. *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 279-280 (1972)(quoting S. Rep. No. 658, 86th Cong., 1st Sess., 2; H.R. Rep. No. 936, 86th Cong., 1st Sess., 1).

Supporters of P.L. 86-272 admitted that they sought to relieve companies from the "heavy cost of compliance" with state tax laws. S. Rep. No. 658, 1959 U.S.C.C.A.N. at 2550. They feared that, after *Northwestern States*, more States would "devise a formula of apportionment to tax the income of businesses carrying on interstate commerce exclusively." S. Rep. No. 658, 1959 U.S.C.C.A.N. at 2551. They "believe[d] that, unless some certainty [was] restored to this area, the economic implications for the economy of the entire Nation may be unfortunate." *Id.* at 2550. Opponents of the bill, on the other hand, criticized it as a "direct invasion" of the right of the States to raise revenue from commerce within their borders. *Id.* at 2558. Supporters of P.L. 86-272 responded that their action was a "stopgap or temporary solution" subject to further study. S. Rep. No. 658, 4-5, 1959 U.S.C.C.A.N. at 2551.

Twenty years later, the Court reviewed the same legislative history and stated that P.L. 86-272 "was designed to define clearly the lower limit for the exercise of [the State's power to tax interstate commerce]." *Heublein*, 409 U.S. at 280. Twenty years after *Heublein*, in 1992, the Court in *Wrigley* noted the continuing litigation over the phrase "solicitation of orders." 505 U.S. at 223-231. Neither *Wrigley* nor *Heublein*, however, considered the constitutional question posed by the "direct invasion" made by P.L. 86-272 of the vital state function of taxation. This petition presents that important question.

B. *Public Law 86-272 Exceeds Congress's Power Under the Commerce Clause and Violates the Tenth Amendment Because It Unduly Restricts the Power of the States to Impose Non-Discriminatory and Fairly Apportioned Taxes on Interstate Commerce Within Their Borders.*

Public Law 86-272 unconstitutionally impairs the power of the States to tax interstate commerce within their borders. The statute represents the "first time in our history" that Congress "enacted general legislation restricting the powers of the States to tax interstate business." J. & W. Hellerstein, *State Taxation*, Vol. I, ¶ 6.10 at 6-23 (2d ed. 1993). Subsequent federal statutes have restricted certain state taxes in very different circumstances, *e.g.*, to prevent discrimination, ensure fair apportionment, or protect federal employees or instrumentalities. However, P.L. 86-272 arguably stands alone as a general prohibition on a tax that is non-discriminatory, fairly apportioned, and based on a constitutional nexus between the taxpayer and the taxing State.

The Court has never considered the constitutionality of P.L. 86-272. Shortly after the enactment of P.L. 86-272 in 1959, three state courts upheld its constitutionality, but none considered the same constitutional claim made here. *International Shoe Co. v. Cocreham*, 164 So.2d 314 (La.), *cert. denied*, 379 U.S. 902 (1964), focused on the relationship between the act and interstate commerce and did not address the question whether there exists some limit to Congress's authority to restrict state taxation. The second case, *State ex. rel. CIBA Pharmaceutical Products, Inc. v. State Tax Commission*, 382 S.W.2d 645, 655-557 (Mo. 1964), likewise addressed whether

P.L. 86-272 constitutes the "regulation of commerce" and whether Congress could have reasonably found the burden imposed by the state taxes to be "undue." The third case, *Smith Kline & French Laboratories v. State Tax Comm'n*, 403 P.2d 375 (Or. 1965), rejected claims that (1) P.L. 86-272 is an "unconstitutional attempt by Congress to adopt new rules of nexus under the authority of the Commerce Clause, or violates due process by usurping the power of the judiciary . . ." and that (2) Congress lacked power to act because "*Northwestern* had upheld the state tax at issue." *Id.* at 378-379 (reversing the Oregon Tax Court, which had held P.L. 86-272 unconstitutional, *see* 1964 WL 134 (Or. Tax Ct.)). None of these courts directly addressed the claim here: that P.L. 86-272 violates the Constitution because it unduly impairs the authority of the States to impose a non-discriminatory, fairly apportioned tax on interstate commerce within their borders.

For more than two hundred years, the Court has resolved "whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States." *New York v. United States*, 505 U.S. 144, 155 (1992). "These questions can be viewed in either of two ways. In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I . . . ." *Id.* "In other cases, the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment." *Id.* (citations omitted). "Either way," the principal question is whether the challenged Act "oversteps the boundary between federal and state authority." *Id.* at 159; *see United States v. Lopez*, 514 U.S. 549, 578, 580, 581 (1995) (Kennedy, J., concurring)(federal statute invalid if it "tips the scales too far" or "contradicts the federal balance").

Three factors show why P.L. 86-272 oversteps the constitutional boundary between federal and state power: (1) P.L. 86-272 restricts -- and thus implies the right to destroy -- the power of taxation, a power that lies at the core of the sovereignty of each State; (2) the restriction on state taxes imposed by P.L. 86-272 is substantial; and (3) P.L. 86-272 exceeds the scope of every other federal law that purports to restrict state taxation.

First, this Court has said that "[t]he power of taxation is fundamental to the very existence of the government of the States." *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U.S. 527, 537 (1931); *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197-199 (1824).[2] Even a strong proponent of the Constitution admitted that "the individual States would . . . retain an independent and uncontrollable authority to raise revenues to any extent of which they may stand in need by every kind of taxation except duties on imports and exports." *The Federalist*, No. 33 (A. Hamilton) at 205 (C. Rossiter ed. 1961).

More recently, both *McKesson v. Division of Alcohol, Beverages & Tobacco*, 496 U.S. 18, 37 n. 19 (1990), and *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 102 (1981), have emphasized that "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all

---

[2] These statements echo the courts of Great Britain regarding an earlier form of sovereignty: "As it is not a kingdom without subjects, so he is not a king without revenues." *An Information Against Bates*, Lane's Reports 23, 145 English Reports (Exchequer) 267 (1606).

of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *McKesson*, 496 U.S. at 37 n. 19 (*quoting Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871)); *see also Arkansas v. Farm Credit Services*, 117 S. Ct. 1776, 1780 (1997). These cases make clear that P.L. 86-272 restricts a power that is vital to the existence of the States and thus "intrude[s] upon an area of traditional state concern." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

Second, the restriction imposed by P.L. 86-272 is substantial. The statute applies to "a net income tax on the income derived within [the] State by any person from interstate commerce . . ." if the person is engaged in the "sale[] of tangible personal property" and limits his activities to those set forth in the statute. 15 U.S.C. § 381(a). The affidavit of a Massachusetts tax official details the fiscal impact of the statute. R.A. 43-44. The affidavit states that, for fiscal years 1993 and 1994, the Department of Revenue assessed taxes or issued notices of intention to assess taxes in 1,580 cases in which the taxpayer invoked P.L. 86-272, totaling $29,578,207. *Id.* These undisputed figures show that P.L. 86-272 significantly affects the collection of corporate excise taxes otherwise permitted by federal constitutional law. In taxing the apportioned net income of these firms, Massachusetts merely seeks "some compensation for facilities and benefits afforded by [it] to income producing activities therein, whether those activities be altogether local or in furtherance of interstate

commerce." *Northwestern States Portland Cement*, 358 U.S. at 469 (Harlan, J., concurring).[3]

Nor are the substantial effects of P.L. 86-272 confined to Massachusetts. *See Wrigley*, 505 U.S. at 224-228 & n. 2 (citing conflicting lower court cases construing term "solicitation"). The application of the statute even after *Wrigley* produces constant litigation. *See, e.g., Commissioner of Revenue v. Kelly-Springfield Tire Co.*, 419 Mass. 262, 643 N.E.2d 458 (1994); *Kennametal, Inc. v. Commissioner of Revenue*, 426 Mass. 39, 686 N.E.2d 436 (1997), *petition for cert. pending*, U.S. Sup. Ct. No. 97-1242. Thus, in enacting P.L. 86-272, Congress has restricted broad state taxes applicable to hundreds -- if not thousands -- of corporations doing business in each of the States. This substantial invasion of the taxing power unconstitutionally disturbs the federal-state balance.

Third, P.L. 86-272 exceeds the scope of every other federal law that restricts state taxation, in that it denies to each State the ability to impose a non-discriminatory, fairly apportioned net income tax on interstate commerce within its borders. The precedent established by P.L. 86-272 was well apparent to the senators who opposed the bill in 1959. They noted that the States "have a vital role in our total government" and that the bill "[took] away from the States powers which [they] h[ad] . . . [and] would constitute an unwise precedent of congressional

---

[3] Public Law 86-272 also undermines the fairness and uniformity sought by the States in the application of their tax laws. For example, the effect of P.L. 86-272 in this case is to exempt the members of NPTC from tax while taxing interstate common carriers of goods who perform identical trucking functions in Massachusetts but are not covered by P.L. 86-272 because they do not solicit orders there.

power and statutory rights of States by curtailing the ability and choice of the States to raise sufficient revenue to carry out proper and necessary State functions." 1959 U.S.C.C.A.N. at 2557. Without sufficient revenue, the opponents predicted, the States "must become powerless wards of the National Government." *Id.* at 2558. These predictions echoed *The Federalist* No. 33, in which Hamilton stated that "a law abrogating or preventing the collection of a tax laid by the authority of a state (unless upon imports and exports) would not be the supreme law of the land, but a usurpation of power, not granted by the constitution." *The Federalist* No. 33 (A. Hamilton) at 205 (C. Rossiter ed. 1961).

The usurpation of power feared by Hamilton is particularly grave here, because P.L. 86-272 exceeds the scope of every other federal law that purports to restrict state taxation. For example, the Railroad Revitalization and Regulatory Reform Act of 1975, Pub. L. No. 94-210, § 306, 90 Stat. 31, 49 U.S.C. § 11503(b)(4)(4-R Act), merely prohibits States from taxing railroad property more heavily than other industrial and commercial property. *See Dep't of Rev. of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 336 (1994); *State of Arizona v. Atchison, Topeka, and Santa Fe Railroad Co.*, 656 F.2d 398, 400, 406-410 (9th Cir. 1981)(upholding constitutionality of 4-R Act). The 4-R Act was intended soley to address concerns about discrimination against interstate commerce. *See ACF Industries, Inc.*, 510 U.S. at 336. Similarly, while 49 U.S.C. § 40116 (1994) (formerly 49 U.S.C. App. § 1513(d)(1)(A)-(C)), restricts state taxes on property used in air transportation, *see Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7, 8-10, 14 n. 10 (1983); *Western Airlines, Inc. v. Board of Equalization of South Dakota*, 480 U.S. 123, 124-26 (1987), the same statute permits a State to impose property taxes, net

income taxes, franchise taxes, and sales and use taxes with respect to air transportation. 49 U.S.C. § 40116(f)(1994).

Congress has similarly acted to prohibit discriminatory taxation of the utility industry. The Tax Reform Act of 1976, Pub. L. No. 94-455, § 2121(a), 90 Stat. 521, 15 U.S.C. § 391 (1994), prohibits States from imposing a tax on the generation or transmission of electricity which discriminates against out-of-state producers or consumers. *See Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141, 146 (1979). The dangers of discrimination against out-of-state interests also likely animated the Supreme Court's statement in *Moorman Mfg. Co. v. Blair*, 437 U.S. 267 (1978), that Congress could act to "require all states to adhere to uniform rules for the division of income." *Id.* at 280. This subject of apportionment is closely related to the question of discrimination against interstate commerce, and the Court in *Moorman* was aware of the recent federal statutes prohibiting discriminatory state taxation. Each of these federal statutes reflects the fact that restraints imposed by the dormant Commerce Clause on the power of a State to tax are principally those that ensure that States will not erect economic barriers to interstate competition. *H.P. Hood & Son v. DuMond*, 336 U.S. 525, 532-534 (1949) (distinguishing between economic protectionism and States' authority to manage their "internal affairs").[4]

---

[4] *Quill Corp. v. North Dakota*, 504 U.S. 298, 316-319 & nn. 9-11 (1992), and other cases concerning the constitutionality of certain state taxes under the Commerce Clause suggest that Congress has some authority to regulate state taxes. Of course, the fact that Congress has *authorized* certain state taxation that would otherwise violate the Commerce Clause, *see, e.g.*, *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946),

Congress has also restricted state taxes that might impair constitutional protections for federal obligations, instrumentalities, and the income of federal employees. *See* 4 U.S.C. § 111 (1994)(banning discriminatory taxes on income of officers and employees of United States); 31 U.S.C. § 3124 (1994)(restricting state taxes on United States obligations, but exempting non-discriminatory franchise and similar taxes); Through these statutes -- like the statutes banning discrimination against interstate commerce -- Congress has codified constitutional immunities against particular forms of state taxation.[5]

Public Law 86-272, however, goes well beyond the other federal statutes that restrict state taxation. Public Law 86-272 denies the States the right to impose a non-discriminatory, fairly apportioned net income tax on interstate commerce, based solely on the congressional judgment that the costs of compliance and other burdens on interstate commerce outweigh the interests of the States. Supporters of P.L. 86-272 admitted that they sought

---

does not mean that Congress may *restrict* state taxation. To the extent that the Court has suggested that Congress has the power to restrict state taxation, it has not explained the constitutional *limits* on such a power. This petition presents an ideal case to describe those limits.

[5] These statutes also show why cases such as *Southeastern Pa. Trans. Auth. v. Pennsylvania Pub. Util. Comm'n*, 826 F. Supp. 1506, 1520-1521 (E.D. Pa. 1993), cited by the court below, are distinguishable. These cases concern federal acts intended to protect instrumentalities created by federal law, such as the Consolidated Rail Corporation and the Amtrak Commuter Services Corporation.

to relieve companies from the "heavy cost of compliance" with state tax laws. 1959 U.S.C.C.A.N. at 2550. Yet the catalyst for the Act -- *Northwestern States* -- had made clear that the state taxes at issue did "not discriminate against *nor subject either corporation to an undue burden*." 358 U.S. at 461-462 (emphasis added). A mere finding of an "undue burden" on interstate commerce is a far weaker basis for a federal restriction on state taxation than discrimination against interstate commerce or a tax on federal instrumentalities or employees. Where there is no question of discrimination against interstate commerce and a State satisfies all other constitutional requirements for a tax, the Tenth Amendment reserves to the States the power to tax their apportioned share of such commerce, free from Congressional regulation. *Cf. Heublein*, 409 U.S. at 284 (Blackmun, J., concurring)(States' power to regulate alcoholic beverages under Twenty-First Amendment "overrides what would otherwise be proscribed by 15 U.S.C. 381"); *In Re Brentwood Outpatient, Ltd.*, 43 F.3d 256, 264 (6th Cir. 1994)("constitutional question" would be presented "were Congress to legislate that a bankruptcy court has the power to void all state tax claims once a debtor files for bankruptcy"), *cert. denied*, 514 U.S. 1096 (1995); *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust*, 679 F.2d 1307, 1313 (9th Cir. 1982) (Tang, J., dissenting) ("finding of [ERISA] preemption" of state tax would "pose a serious obstacle" to State's tax power, "casting doubt on [federal law's] constitutionality").

Without a meaningful limit on congressional power to restrict state taxation, a vital function of the States would be in grave danger. If Congress can restrict a fairly apportioned, non-discriminatory tax on interstate commerce, it could prohibit it altogether. If Congress may prohibit taxes on interstate

commerce, it could prohibit a tax on *intra*state commerce that "affects" interstate commerce. Similarly, if Congress may enact P.L. 86-272, it could prohibit state taxes on particular industries. *See* H. 1054 (1997) (Internet Tax Freedom Act). Thus, the power to restrict state taxes may become the power to destroy them. This petition presents the Court with an ideal case to determine the limits of this dangerous Congressional power.

Finally, cases concerning "direct" taxes further show that the Constitution does not permit the nullification of otherwise constitutional state taxes. Congress may not impose a direct tax on a "State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands . . . ." *New York v. United States*, 326 U.S. 572, 587 (1946)(Stone, C.J., concurring). Such a federal tax may "so affect the State . . . as to interfere unduly with the State's performance of its sovereign functions of government." *Id.* "[N]either government may destroy the other nor curtail in any substantial manner the exercise of its powers. Limitation[s] cannot be so varied or extended as seriously to impair *either the taxing power of the government imposing the tax* . . . or the appropriate exercise of the functions of the government affected by it." *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523-524 (emphasis added). These cases provide further support for the conclusion that the federal government may not unduly limit the taxing power of the States.

In sum, the Framers did not intend that the laying of otherwise constitutional state taxes should be subject to the "by-your-leave " of Congress. The Act impairs a power that lies at the core of the sovereignty of the States. For these reasons, it

exceeds the power of Congress under the Commerce Clause and violates the Tenth Amendment.[6]

---

[6] The unconstitutionality of P.L. 86-272 does not undermine preemption principles. Congress may preempt the exercise of state regulatory authority, but "taxes are not regulations in any sense of that term." *Northwestern States*, 358 U.S. at 461. Taxes lie at the core of state sovereignty, and may not be nullified by Congress, at least not the same extent as P.L. 86-272.

CONCLUSION

For the reasons stated above, the Court should grant the petition for a writ of certiorari to the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

MASSACHUSETTS COMMISSIONER
OF REVENUE

By his attorneys,

SCOTT HARSHBARGER
ATTORNEY GENERAL

Thomas A. Barnico*
Assistant Attorney General
**Counsel of Record*
One Ashburton Place
Boston, MA 02108-1698
(617) 727-2200, ext. 2086

Dated: March 23, 1998

TAB/dsa
F:\USERS\BARNIT\WPWIN60\WPDOCS\NPTC\USBRFPET.WPD

NATIONAL PRIVATE TRUCK COUNCIL, INC. vs. COMMISSIONER OF REVENUE.

Suffolk. September 5, 1997 - December 22, 1997.

Present: WILKINS, C.J., ABRAMS, LYNCH, GREANEY, FRIED, MARSHALL, & IRELAND, JJ.

Regulation. Taxation, Income tax, Excise. *Constitutional Law,* Taxation, Federal preemption. Interstate commerce, Commerce clause. *Interstate Commerce.*

Public Law 86-272, codified at 15 U.S.C. § 381 (1994), affording tax immunity to foreign corporations whose only contact with Massachusetts consists of soliciting orders for tangible personal property and delivering such property into the Commonwealth from a point outside Massachusetts, preempts the provisions of 830 Code Mass. Regs. § 63.39.1(5) (1993), as interpreted and imposed by the Commissioner of Revenue to exempt from taxation corporations using common or contract carriers for such shipments or deliveries but to subject to taxation corporations using private carriers, inasmuch as § 381 makes no such distinction and there was a clear and manifest congressional intent to preempt such State regulations. [328-329]

Section 381 of 15 U.S.C. (1994), prohibiting States from imposing taxes that interfere with interstate commerce is within Congress's authority under the commerce clause and does not implicate the Tenth Amendment to the Constitution of the United States. [329-331]

CIVIL ACTION commenced in the Superior Court Department on September 30, 1993.

The case was heard by *David M. Roseman,* J., on a statement of agreed facts.

The Supreme Judicial Court granted an application for direct appellate review.

Thomas A. Barnico, Assistant Attorney General, for the Commissioner of Revenue.

Richard P. Schweitzer, of the District of Columbia (*Wesley S. Chused* with him) for National Private Truck Council, Inc.

ABRAMS, J. At issue is the question whether 830 Code Mass. Regs. § 63.39.1(5) (1993) (regulation) violates Federal statute, Pub. L. 86-272, codified at 15 U.S.C. § 381 (1994), and

whether, as the Commissioner of Revenue (commissioner) argues, § 381 is unconstitutional as it unduly impairs the sovereign power of the State to tax interstate commerce within its borders and thus violates the United States Constitution's Tenth Amendment reservation of power to the States. The plaintiff filed a complaint in Superior Court seeking a declaration that the Federal statute preempts the regulation and that Congress was within its power in enacting § 381. The parties filed a statement of agreed facts and cross motions for summary judgment. A judge in the Superior Court entered a declaration that the regulation "violates 15 U.S.C. § 381 ([Pub. L.] 86-272) by reducing the scope of tax immunity the [F]ederal statute affords to foreign corporations whose only contact with Massachusetts consists of soliciting orders for tangible personal property, and delivering such property into the Commonwealth from a point outside Massachusetts in the corporation's private vehicles; [t]hat 830 Code Mass. Regs. [§] 63.39.1(5) (1993) as applied to such foreign corporations is hereby declared to be preempted by 15 U.S.C. § 381 ([Pub. L.] 86-272); and [t]hat 15 U.S.C. § 381 ([Pub. L.] 86-272) is constitutional." The commissioner appealed. We granted the plaintiff's application for direct appellate review. We agree with the declaration entered by the Superior Court judge. We affirm.

We set forth the agreed facts. The plaintiff is the national trade association of more than 1,000 corporations that operate their own truck fleets to transport and deliver their products. Some of the plaintiff's members own their own trucks. Other members lease the trucks used for delivery from a subsidiary corporation, or from another carrier. A number of the plaintiff's members, not incorporated or based in Massachusetts, regularly solicit sales of tangible goods in Massachusetts. These orders are sent outside the Commonwealth for approval, and once approved, are filled from a point outside Massachusetts. The plaintiff's members then use their own trucks to make deliveries to their customers in Massachusetts.[1]

Section 381 expressly restricts the authority of a State to

[1]This type of transportation arrangement, where a company transports its goods in vehicles owned or leased by it, is known as "private carriage." "Common carriage" or "contract carriage," by contrast, is for-hire transportation in which the shipper and the carrier are different entities. The parties have stipulated that, for the purposes of this case, there is no difference between "common" and "contract" carriers and we refer to both simply as "common carriers."

impose an income tax on foreign corporations whose business within the State consists solely of "the solicitation of orders . . . for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State."[2]

The regulation, promulgated by the commissioner on January 1, 1990, pursuant to his authority under G. L. c. 62C, § 3, governs the question whether a foreign corporation is subject to the Massachusetts excise tax under G. L. c. 63, § 39 (1990 ed.).[3] The regulation includes, among other things, a section entitled, "Exception for Solicitation Activities Protected by [§ 381]." This exception states that a foreign corporation whose activities fall within the scope of the Massachusetts statute and regulation "nevertheless is not subject to Massachusetts taxation if Massachusetts is precluded from exercising its jurisdic-

[2]The relevant portions of 15 U.S.C. § 381 (1984) provide: "(a) . . . No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

"(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for authorization or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

"(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

"(b) . . . The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to —

"(1) any corporation which is incorporated under the laws of such State; or

"(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State."

[3]General Laws c. 63, § 39, provides in part: "Except as otherwise provided herein, every foreign corporation . . . actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth, shall pay [excise tax]. . . .

"A foreign corporation shall not be subject to tax under this chapter if the foreign corporation is engaged in the business of selling tangible personal property and taxation of that foreign corporation under this chapter is precluded by the Constitution or laws of the United States . . . ."

tion by [§ 381]." The regulation interprets § 381 as not imposing the Massachusetts excise on a foreign corporation:

> "if the sole activity of the corporation in Massachusetts is the solicitation by the corporation's representatives (in the name of the corporation or in the name of a prospective customer) of orders for the sale of tangible personal property, provided that the orders are sent outside Massachusetts for approval or rejection, and provided that the orders are filled by shipment or delivery by common carrier or contract carrier from a point outside of Massachusetts."[4]

The parties agree that the regulation exempts from State taxation entities that solicit in Massachusetts orders approved and filled from a point outside out of the State who use common carriers to fill their orders in State. The Commissioner, however, claims that § 381 does not exempt similarly situated entities who use their own vehicles to bring their goods into Massachusetts. The plaintiff contends that § 381 preempts the regulation.

Generally preemption is not favored. *Sawash* v. *Suburban Welders Supply Co.*, 407 Mass. 311, 315 (1990). Because § 381 impinges on the States' sovereign powers of taxation, "unless

[4]Title 830 Code Mass. Regs. § 63.39.1(5)(a) provides, in pertinent part: "A foreign corporation whose activities fall within those described in G.L. c. 63, [§] 39 and 830 [Code Mass. Regs. §] 63.39.1(4) [listing those things that subject a corporation to taxation] nevertheless is not subject to Massachusetts taxation if Massachusetts is precluded from exercising its jurisdiction by [Pub. L.] 86-272 . . . . [Pub. L.] 86-272 currently precludes the imposition of the excise under [G.L.] c. 63, [§] 39, upon a foreign corporation if the sole activity of the corporation in Massachusetts is the solicitation by the corporation's representatives (in the name of the corporation or in the name of a prospective customer) of orders for the sale of tangible personal property, provided that the orders are sent outside Massachusetts for approval or rejection, and provided that the orders are filled by shipment or delivery by common carrier or contract carrier from a point outside of Massachusetts."

The regulation also provides the following example of a foreign corporation subject to tax: "Humble Homes is a foreign corporation that sells furniture. The company regularly delivers furniture that it had sold to locations in Massachusetts using its own delivery trucks. The delivery trucks are corporate property that the company owns or uses in Massachusetts in a corporate capacity within the meaning of 830 Code Mass. Regs. 63.39.1(4)(d). The delivery of goods does not constitute 'solicitation' of orders. Humble Homes is therefore subject to the excise under G. L. c. 63, § 39." 830 Code Mass. Regs. § 63.39.1(10), example 8.

Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance." *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275, 281-282 (1972), quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971); *English* v. *General Elec. Co.*, 496 U.S. 72, 79 (1990) ("state law is pre-empted to the extent that it actually conflicts with federal law"). Here Congress has made its purpose clear. "Section 381 was designed to define clearly a lower limit for the exercise of [State taxing] power. . . . By establishing such a limit, Congress did, of course, implicitly determine that the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy." *Heublein*, *supra* at 280.

The commissioner urges us to interpret the phrase, "filled by shipment or delivery from a point outside the state" and, in particular, to construe the word "delivery" as referring to a transaction in which title passes from shipper to customer at a point outside of the State.[5] The commissioner points to provisions of the Uniform Commercial Code enacted prior to § 381 in support of his contention that Congress intended to protect only out-of-State transactions from taxation. The commissioner contends that his interpretation should prevail because § 381 includes areas that " 'traditionally [have been] occupied by the States' [and in those circumstances] congressional intent to supersede state laws must be 'clear and manifest.' " *English*, *supra* at 79, quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The commissioner concludes that the congressional intent to supersede State tax law by enacting § 381 is not "clear and manifest." The Superior Court judge rejected the commissioner's argument, concluding that there was congressional intent to preempt the regulation, and that the term "delivery"[6] in the context of § 381 is not limited to out-of-State deliveries.

Neither the language of the statute nor its legislative history

[5]The parties agree that "shipment" refers to sending goods by mail or common carrier.

[6]We note that the dictionary definitions of the word "delivery" favor the plaintiff. Delivery is "the act of putting property into the legal possession of another." Webster's Third New Int'l Dictionary 597 (1993). Black's Law Dictionary defines delivery as the "act by which the res or substance thereof is placed within the actual or constructive possession or control of another." Black's Law Dictionary 428 (6th ed. 1990). Neither of these definitions includes the meaning suggested by the commissioner.

suggests that Congress intended the specialized meaning the commissioner urges.[7] The statute refers to shipment or delivery "from" a point outside the State, not "at" a point outside the State. The language requires only that the goods originate from out-of-State, not that the transfer of goods to the buyer occurs outside the taxing State. See 1 J. & W. Hellerstein, State Taxation at 6-32 (2d ed. 1993).

Further, the statute describes "shipment or delivery from a point outside the State" as part of the protected business activity that may take place "within the [taxing] State." Section 381. As the plaintiff argues, this makes sense only if "shipment or delivery" is read to mean transportation of goods that originate outside the taxing State and then enter the State.

Other States have reached the same conclusion we do. In construing § 381, the Supreme Court of Virginia stated that "[i]n enacting § 381, Congress did not identify any manner of delivery necessary to qualify for immunity. Section 381 does not specify common carrier, contract or private carrier, or any other particular method of delivery." *Virginia Dep't of Taxation* v. *National Private Truck Council, Inc.*, 253 Va. 74, 77 (1997). The tax authorities in New Jersey and New York have also opined that private carriage is protected by § 381. See New Jersey State Tax News at 4 (Spring 1996); New York Advisory Op. TSB-A-84 (11)C (September 14, 1984). But see Florida Tech. Assistance Advisement No. 95(c)1-004 (March 17, 1995) (advising that private carriage is not protected by § 381).

The commissioner also argues the regulation should be upheld because § 381 is unconstitutional. The commissioner contends that § 381 unduly impairs the sovereign power of the State to

[7]Legislative history supports our interpretation. "[I]f the only business presence within the State by a [company] engaged in interstate commerce is the solicitation . . . of orders for sales of tangible personal property and the orders are sent to an office out of state for approval or rejection, and if the order is approved, it is filled by shipment or delivery from a stock of goods, warehouse, plant, or factory located out of the State, the net income tax of the State . . . on income derived within the State by such [company] from interstate commerce may not be imposed." S. Rep. No. 658, 86th Cong., 1st Sess., pt. 6, at 2553 (1959) (Committee on Finance).

Moreover, there are indications that Congress in fact sought to avoid exposing corporations to taxation based on the sort of distinction the commissioner is trying to make. *Id.* at 2550 (noting that disparate State definitions of point of sale exposes corporations to uncertain and multiple State tax liabilities to the potential detriment of interstate commerce).

tax interstate commerce within its borders, in violation of the principles of federalism and the Tenth Amendment's reservation of power to the States. See *International Shoe Co.* v. *Cocreham*, 246 La. 244, 266, cert. denied sub nom. *Mouton* v. *International Shoe*, 379 U.S. 902 (1964) (rejecting the Tenth Amendment claim raised here); *State ex rel. CIBA Pharmaceutical Prods., Inc.* v. *State Tax Comm'n*, 382 S.W.2d 645, 657 (Mo. 1964) (same). We disagree.

Congress's plenary power to regulate interstate commerce is well established. See, e.g., *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981). Consistent with this power, Congress can prohibit States from imposing taxes that interfere with interstate commerce. See, e.g., *Arizona Pub. Serv. Co.* v. *Snead*, 441 U.S. 141, 150 (1979). Where Congress acts within an enumerated power, such as its authority under the commerce clause, the Tenth Amendment is not implicated. *New York* v. *United States*, 505 U.S. 144, 156 (1992).

Moreover, merely limiting the States' power to tax is not sufficient encroachment upon the States' sovereign authority to warrant invalidating a Federal statute under the Tenth Amendment. See *Arizona* v. *Atchison, Topeka & Santa Fe R.R.*, 656 F.2d 398, 407 (9th Cir. 1981) ("We know of no authority for the proposition that Congress may not interfere with state taxation in furtherance of its power over interstate commerce"); *Southeastern Pa. Trans. Auth.* v. *Pennsylvania Pub. Util. Comm'n*, 826 F. Supp. 1506, 1520-1521 (E.D. Pa. 1993) ("The fact that pre-emptive federal legislation may impinge on a state revenue-raising scheme has no special Tenth Amendment implications. . . . Congress can, in furtherance of its commerce power, displace state taxation"), aff'd, 27 F.3d 558 (3d Cir.), cert. denied, 513 U.S. 928 (1994); *Arkansas-Best Freight Sys., Inc.* v. *Cochran*, 546 F. Supp. 904, 910 (M.D. Tenn. 1981) ("[T]he constitutional power of Congress under the commerce clause clearly permits some limitation on the states' power of taxation. As long as the legislation is rationally related to the goal of protecting interstate commerce . . . the mere fact that a state taxation scheme is affected does not itself invalidate the legislation"). Congress enacted § 381 pursuant to its power to regulate interstate commerce. *Kennametal, Inc.* v. *Commissioner of Revenue*, *ante* 39, 41 (1997). See *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275, 279-281 (1972). Congress sought to allay concern that arose following the United States

Supreme Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959), that "mere solicitation" would subject a foreign corporation to State taxation. See *Commissioner of Revenue* v. *Kelly-Springfield Tire Co.*, 419 Mass. 262, 265 (1994); *Heublein*, *supra* at 280. Section 381 sets a uniform minimum standard which must be met before a State may tax interstate commerce. See *Heublein*, *supra* at 280; *CIBA Pharmaceutical Prods.*, *supra* at 657. This is clearly within the ambit of Congress's commerce power. See *International Shoe*, *supra* at 266; *CIBA Pharmaceutical Prods.*, *supra* at 657.

Nor does § 381 exceed Congress's constitutional power by mandating State legislation or otherwise commandeering the States' legislative process. See *New York* v. *United States*, *supra* at 161; *Hodel*, *supra* at 288. Section 381 requires no State legislation or otherwise "command . . . state governments to implement legislation enacted by Congress." *New York* v. *United States*, *supra* at 176. The limitation set in § 381 is a permissibly small preclusion of State taxing power to protect interstate commerce.

The declaration entered by the Superior Court was correct and is affirmed.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 93-5647-H

NATIONAL PRIVATE TRUCK COUNCIL,
Plaintiff,

vs.

COMMISSIONER OF REVENUE OF
MASSACHUSETTS,
Defendant.

CONCLUSIONS OF LAW AND ORDER

Plaintiff National Private Truck Council ("NPTC"), a national trade association whose members operate truck fleets, brings this action challenging a regulation promulgated by the Massachusetts Commissioner of Revenue ("DOR"). NPTC alleges that 830 Code Mass. Regs. 63.39.1(5)(1993)("the regulation") which applies Massachusetts corporate net income tax to certain foreign corporations using Massachusetts roadways to transact business, violates 15 U.S.C. § 381, commonly referred to as Public Law 86-272 ("P.L. 86-272").[1]

---

[1] Since this court finds that the regulation is preempted by federal law, the court will not reach plaintiff's other claims

For the following reasons, this court will enter a declaratory judgment to the effect that 830 Code Mass. Regs. 63.39.1(5) (1993) is preempted by P.L. 86-272.

BACKGROUND

This matter is before the court on a joint statement of agreed facts, incorporated herein by reference.[2] Thus, the record before the court presents a "case stated." *Hickey v. Green*, 14 Mass. App. Ct. 671, 671 n.2 (1982), rev. denied 388 Mass. 1102 (1983), quoting *Quinton Vespa v. Construction Service Co.*, 343 Mass. 547, 551-552 (1962). A case stated is an agreement by the parties of all pertinent facts, from which the court may draw inferences. *Reilly v. Local 589, Amalgamated Transit Union*, 22 Mass. App. Ct. 558, 568, rev. denied, 398 Mass. 1105 (1986). On the basis of these material facts, it is the duty of the court to order the correct judgment of the parties' rights as a matter of law. *Quinton Vespa,* 343 Mass. at 552; *Saiphier v. Devonshire Street Fund, Inc.*, 352 Mass. 683, 685 (1967).

The issue of law before this court is whether 830 Code Mass. Regs. 63.39.1(5), as construed and applied here by the Commonwealth, is preempted by P.L. 86-272.

---

regarding the regulation.

[2] The statement contains three separate documents which will be referred to as follows: "[Document name]/[page number]".

CONCLUSIONS OF LAW

The regulation was promulgated under the authority of G.L. c. 63 § 39 (1990), which provides in pertinent part:

> Except as otherwise provided herein, every foreign corporation ... actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth, shall pay [excise tax]. ... A foreign corporation shall not be subject to tax under this chapter if the foreign corporation is engaged in the business of selling tangible personal property and taxation of that foreign corporation under this chapter is precluded by the Constitution or laws of the United States.

The regulation "describes the circumstances under which a foreign corporation is subject to the tax jurisdiction of Massachusetts under M.G.L. c. 63 § 39." 830 Code Mass. Regs. 63.39.1(1)(a)(1993). The regulation expressly recognizes that the Commonwealth's tax jurisdiction is limited by federal laws, including P.L. 86-272. Under 830 Code Mass. Regs. 63.39.1(5), foreign corporations are immune from Massachusetts' income tax if they fall within P.L. 86-272's ambit. In relevant part, 830 Code Mass. Regs. 63.39.1(5)(a) states:

> A foreign corporation whose activities fall within those described in G.L. c. 63 § 39 and 830 C.M.R. 63.39.1(4) [listing those activities that subject a corporation to taxation] nevertheless is not subject to Massachusetts taxation if Massachusetts is precluded from

> exercising its jurisdiction by P.L. 86-272. ... P.L. 86-272 currently precludes the imposition of the excise under M.G.L. c. 63 § 39, upon a foreign corporation if the sole activity of the corporation in Massachusetts is the solicitation by the corporation's representatives (in the name of the corporation or in the name of a prospective customer) of orders for the sale of tangible personal property, provided that the orders are sent outside Massachusetts for approval or rejection, and provided that the orders are filled by shipment or delivery by common carrier or contract carrier from a point outside of Massachusetts.

The regulation goes on to define which activities constitute solicitation for the purposes of the Commonwealth's tax jurisdiction, tracking the language of *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992). In that case, the United States Supreme Court defined what constituted "solicitation" for purposes of P.L. 86-272.[3]

P.L. 86-272 itself provides in pertinent part that:

> No State ... shall have the power to impose ... a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person ... are either, or both, of the following:

---

[3] The *Wrigley* case did not address what constitutes "delivery", specifically the facilities employed for delivery, for purposes of tax immunity under P.L. 86-272.

> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State.
>
> (2) the solicitation of orders by such person, or his representative, in such state in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

P.L. 86-272 is not a grant of authority for a state to tax, but rather provides interstate businesses with immunity from state income tax. Richard L. Hirshberg & Alan Nedry, *A Federal Concept of Doing Business*, 46 Va. L. Rev. 1241, 1242 (1960). The DOR recognizes that P.L. 86-272 prohibits a state from imposing an income tax if the corporation's "sole business activities in the state consist of 'solicitation of orders' for tangible goods, provided that the orders are sent outside the state for approval and the *goods are shipped or delivered from out of state*." DOR Directive 95-7/2 (emphasis added).

The parties' disagreement centers around the meaning of "delivery" in the following circumstance: a company wishing to ship or deliver goods into Massachusetts may do so either by common carriage, contract carriage, or private truck. Statement/2. Currently, there is virtually no operating distinction between common carriers and contract carriers. Statement/2. DOR contends that, for the corporation to fall

under P.L. 86-272's immunity, delivery must occur outside Massachusetts via a common carrier. In that event, DOR argues, title to the goods passes to the buyer on assumption of possession by the common carrier, a circumstance that occurs outside Massachusetts and results in statutory immunity. NPTC, on the other hand, contends that "delivery" embraces the circumstance when its members' private trucks deliver the solicited goods. In NPTC's view, foreign corporations who deliver goods into Massachusetts from a point outside the Commonwealth using a private truck are immune from taxation under P.L. 86-272.

A. *Preemption Analysis*

At the outset, this Court notes that as a general rule "preemption is not favored, and state laws should be upheld unless a conflict with federal law is clear. ... The burden is on the party seeking to displace the state action to show preemption with hard evidence of conflict based on the record." *Sawash v. Suburban Welders Supply Co.*, 407 Mass. 311, 315 (1990). The conflict must be actual, not based on mere "unsupported pronouncements as to federal policy." *Attorney General v. Brown*, 400 Mass. 826, 829 (1987).

In addition, federal preemption is less likely to be found in areas of local, rather than national, concern. *Brown*, 400 Mass. at 829. Such is not the case here. P.L. 86-272 and the regulation at issue both address taxation of interstate commerce. While taxation is a joint state and federal concern, the statutes and regulation here impact interstate commerce. Thus, the issues revolve less around local concerns than national ones, and in such an event, preemption is favored. See, *Id.*

Under the Supremacy Clause of Article VI of the Constitution, state courts are "obligated to declare invalid any State statute or regulation" that is preempted by federal law. *Commonwealth v. College Pro Painters (U.S.) Ltd.*, 418 Mass. 726, 728 (1994). Thus, state law that conflicts with federal law is preempted and is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

Preemption analysis arises in three situations. First, a state law will be preempted if, in the text of the federal legislation itself, Congress has explicitly provided that all state laws to the contrary are preempted. *Sawash*, 407 Mass. at 314; *E.E.O.C. v. Commonwealth of Mass.*, 987 F.2d 64, 67 (1st Cir. 1993). That is not the case here. P.L. 86-272 contains no statement of preemption. Rather, the text of the legislation recognizes that states may determine when an income tax will be imposed. It does not specifically preempt the enactment of such state laws.

In the absence of an express statement, preemption may be implied when, based on the totality of the circumstances, Congress has "occupied the field," creating a pervasive and comprehensive scheme of regulation which leaves no room for state legislation. *Brown*, 400 Mass. at 828; *Sawash*, 407 Mass. at 314; *Arthur D. Little, Inc. v. Comm'r of Health and Hospitals of Cambridge*, 395 Mass. 535, 548 (1985); *Building and Construction Trades Council of the Metro. Dist. v. Assoc. Builders and Contractors of Mass./Rhode Island, Inc.*, 507 U.S. 218, 224 (1993); *Tart v. Commonwealth of Mass.*, 949 F.2d 490, 500 (1st Cir. 1990). P.L. 86-272 is inconsistent with an exclusive federal scheme, however, in that it "envisions state participation" in the taxation of foreign corporations by expressly acknowledging state legislation. See, *MacInnes v. Comm'r of Public Welfare*, 412 Mass. 790, 796 (1992).

Third, "if Congress has not displaced state regulation entirely, it may nonetheless preempt state law to the extent that it actually conflicts with the federal law." *Sawash*, 407 Mass. 311; *Brown*, 400 Mass. at 829; *Tart*, 949 F.2d at 500. Actual conflicts arise when "compliance with both state and federal law is impossible or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Sawash*, 407 Mass. at 314; *Brown*, 400 Mass. at 829.

Here, compliance with both statutes is not physically impossible. Some NPTC members use common carriers to ship or deliver goods into Massachusetts. Statement/5. By doing so, the corporation will be immune from taxation under the regulation; thus, it is possible for a corporation to comply with both the federal and state laws in such a way as to avoid taxation.

However, in this court's view, the regulation here does "stand as an obstacle to the purposes and objectives of the federal legislation." To determine what the congressional purposes and objectives of P.L. 86-272 were, Congressional intent is the cornerstone. *Cipollone*, 504 U.S. at 516; *College Pro*, 418 Mass. at 728. See also, *Sawash*, 407 Mass. at 317.

B. *Congressional Intent*

To determine Congressional purpose and intent, the court must "examine the explicit statutory language and the structure and purpose of the statute." *College Pro*, 418 Mass. at 728. P.L. 86-272. "[T]he unambiguous language of [P.L. 86-272] ... is the principal source of insight into congressional purpose, and is to be applied as written." *Comm'r of Revenue v. Kelly-Springfield Tire Co.*, 419 Mass. 262, 267 (1994).

P.L. 86-272 was enacted in response to a series of Supreme Court decisions allowing states to levy income tax on foreign corporations. See, *Id.* at 265; *Heublein. Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 279 (1972). In 1959, the Supreme Court held that the net income from a corporation transacting interstate business was taxable by states under a non-discriminatory, fairly apportioned levy. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). The Court subsequently denied certiorari in two Louisiana cases, in which the lower courts upheld Louisiana's tax on the income of foreign corporations made on interstate business.[4]

The business community reacted strongly to the impact these decisions would have, particularly on small businesses transacting commerce across state lines. 105 Cong. Rec. 16,359 (1959), quoted in Timothy J. Sweeney, *State Taxation of Interstate Commerce Under Public Law 86-272: "A Riddle Wrapped in an Enigma Inside a Mystery"*, 1984 B.Y.U. L. Rev. 169, 173 n.25-26, 182 (1984); Paul J. Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 Vand. L. Rev. 353, 357 (1976). There was concern that as a result of soliciting orders within a state, out-of-state corporations would be exposed to income tax liability. Sweeney, 1984 B.Y.U. L. Rev. at 172; *Heublein*, 409 U.S. at 280.

As a result, P.L. 86-272 was enacted, purportedly as a temporary stop-gap to maintain the status quo pending further

---

[4] *Brown-Forman Distillers Corp. v. Collector of Revenue*, 101 So. 2d 70 (La. 1953), cert. denied, 359 U.S. 28 (1959); and *International Shoe Co. v. Fontenot*, 107 So. 2d 640 (La. 1958), cert. denied, 359 U.S. 984 (1959).

study. *Id.* at 281; Sweeney, 1984 B.Y.U. L. Rev. at 181-182; Hartman, 29 Vand. L. Rev. at 362. P.L. 86-272 "substantially limited the power of the states to tax income from interstate commerce." Hirshberg & Nedry, 46 Va. L. Rev. at 1241. It was designed to "define clearly a lower limit for the exercise" of a state's power to tax the local activities of foreign corporations, *Heublein*, 409 U.S. at 280, 281 n.7, by defining what "minimum activities would not be subject to state taxation." Sweeney, 1984 B.Y.U. L. Rev. at 180.

Thus, P.L. 86-272 was intended as a provision for "tax immunity" for businesses engaged solely in certain activities, rather than a grant of authority under which a state may levy a tax. Hirshberg & Nedry, 46 Va. L. Rev. at 1242 n.12.

> The general effect of Public Law 86-272 is to provide guidelines, established by Congress, as to what constitutes 'doing business' within a state for the purpose of determining that state's power to impose a net income tax on income derived from interstate commerce. ... [Public Law 86-272] specifies certain minimum activities which can be carried on within a state by a person engaged exclusively in interstate commerce with the assurance that none of his income can be taxed by such state or political subdivision.

Id. at 1242. From this, it is discerned that the congressional intent and purpose behind P.L. 86-272 "was to remove from the ambit of harassment those businesses having few, if any, real roots in the importing or market state." *Id.* at 1255.

C. *Taxation of Private Truck Deliveries in Other Jurisdictions*

Other states also levy income tax on foreign corporations immune from taxation under P.L. 86-272 but for their use of private trucks to deliver the solicited goods. The results have varied, even within the same state. In 1992, Florida found that a corporation whose only activities within the state were solicitation of orders filled by shipment or delivery from a point outside the state by private trucks was exempt from corporate income tax. Fla. Tech. Assistance Advisement No. 92(M)-008 (October 15,1992), Pl.'s Memo. in Supp. Summ. J. at Appendix C. Three years later, however, Florida treated the shipment and delivery of goods by company-owned vehicles as unprotected, taxable activity. Fla. Tech. Assistance Advisement No. 95(c) 1-004 (March 17, 1995), attached to Def.'s letter to court of June 14, 1995.

In 1992, the Virginia Department of Taxation revoked its prior policy, and began taxing corporations who delivered goods into Virginia using private trucks. Corporation Income Tax - Ruling Req. PD 92-230 (November 9, 1992), attached to Def.'s Memo. in Opp'n Pl.'s Summ. J. at 12 n.3. The Virginia Circuit Court, however, overturned this policy, holding that the Virginia regulation violated P.L. 86-272: "the clear and plain meaning of 15 U.S.C. § 381 is that States may not impose a net income tax on out-of-state corporations whose only contact with the taxing state consists of soliciting orders for goods and delivering the goods into the State in the corporations' own vehicles." Order, Alexandria Circuit Court, dated December 18, 1995, exhibit to Pl.'s Memo. in Supp. of Mo. to File Supplemental Authority.

New York found that delivery using private vehicles was protected under P. L. 86-272. Advisory Op. TSB-A-84(11)C (September 14, 1984), Pl.'s Memo. in Supp. Summ. J. at Appendix A. New Jersey tax authorities also have decided that a manufacturer or wholesaler who merely delivers their own goods into the state in their own trucks is protected under P.L. 86-272. New Jersey State Tax News, Spring 1996, attached to Pl.'s Memo. in Supp. of Second Mo. to File Supplemental Authority in Supp. of Pl.'s Summ. J.

D. *Definition of "Delivery"*

The term "delivery" is not expressly defined in P.L. 86-272, and the lack of federal or state case law interpreting the term leaves this court without a clear statutory directive regarding whether delivery of goods into Massachusetts by private truck is immune from taxation under P.L. 86-272. The legislative history indicates that the congressional committee evaluating P.L. 86-272 believed that delivery of goods in a company-owned vehicle was protected from taxation. See, Fla. Tech. Assistance Advisement No. 92(M)-008 (October 15, 1992), *supra.*, citing the Willis Committee Report.

DOR interprets "delivery", in conjunction with the U.C.C, to mean that title passes outside the Commonwealth through the use of a common carrier. Thus, DOR argues, if a foreign corporation delivers goods into Massachusetts in its own trucks, title passes inside Massachusetts, and P.L. 86-272 does not protect the corporation from Massachusetts income tax.

However, "delivery" also may be defined as the "act of putting property into the legal possession of another," Webster's Unabridged New International Dictionary 597 (3d ed. 1967), regardless of where that transaction occurs. Black's Law

Dictionary defines "delivery" as "the act by which the res or substance thereof is placed within the actual or constructive possession or control of another." Black's Law Dictionary 428 (6th ed. 1990).

A general rule of statutory construction is that "where the language of the statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words." *Comm'r of Revenue v. AMI Woodbroke, Inc.*, 418 Mass. 92, 94 (1994). A court should not construe a statute in such a way that produces an absurd or unreasonable result when a sensible construction otherwise is readily available. *Manning v. Boston Redevelopment Auth.*, 400 Mass. 444, 453 (1987).

A reasonable, sensible construction of the term "delivery" in the context of P.L. 86-272 would thus not limit it solely to deliveries occurring out-of-state. P.L. 86-272 is clear on its face. Under its explicit language, Massachusetts may not tax a corporation whose only business activity within the Commonwealth consists of soliciting orders for tangible goods, provided that "the orders are sent outside the State f or approval and the goods are delivered from out-of-state." *Wrigley*, 505 U.S. at 215. As long as the solicited goods are shipped or delivered from a point outside the state, the corporation is immune from income tax based on that transaction. Hartman, Vand. L. Rev. at 360-361. If Congress had intended to define "delivery" to include only those transfers of title occurring outside the taxing state, it would have inserted language to that effect. See, *Kelly-Springfield*, 419 Mass. at 267.

DOR also argues that delivery in private vehicles creates a separate and significant service in Massachusetts, creating a business presence within the Commonwealth and subjecting the corporation to Massachusetts' income tax. The court is

unpersuaded. The deliveries at issue are directly connected to the solicitation activities protected under P.L. 86-272.

DOR also contends that P.L. 86-272 is unconstitutional because it impairs the sovereign power of Massachusetts to tax commerce within their borders. This contention is without merit. The constitutionality of P.L. 86-272 was upheld in *International Shoe Co. v. Corcreham*, 164 So. 2d. 314 (La.), *cert. denied*, 379 U.S. 902 (1964). Furthermore, P.L. 86-272 only provides immunity from net income taxes. It does not prevent Massachusetts from taxing foreign corporations based on unprotected activities, such as an out-of-state corporation maintaining an office or place of business within the Commonwealth, or engaging in activities beyond the scope of P.L. 86-272.

E. *Conclusion*

The regulation imposes income taxes on corporations who have made a business decision to conduct transactions across interstate lines using private trucks, instead of common carriers, to deliver their goods into Massachusetts. Approximately 45% of corporations using private trucks are engaged in manufacturing. Private Fleet Profile/15. These corporations may have decided to use private trucks, for example, because the use of a private truck may be more appropriate for short hauls of heavy goods, or longer hauls of lighter goods. Private Fleet Profile/15.

Congress enacted P.L. 86-272 to protect corporations from being taxed by a state when its only contact with that state was solicitation of goods, and shipment or delivery of those goods from a point outside the taxing state. NPTC has met its burden of proof by demonstrating that the regulation places tax liability

on a foreign corporation which would otherwise be immune under P.L. 86-272. This exercise of the Commonwealth's tax jurisdiction conflicts with the purpose and policies behind the enactment of P.L. 86-272.

ORDER

For the foregoing reasons, it is hereby ***ORDERED*** that a declaration shall enter ***DECLARING*** that:

Regulation 830 Code Mass. Regs. 63.39.1(5) (1993) violates 15 U.S.C. § 381 (P.L. 86-272) by reducing the scope of tax immunity the federal statute affords to foreign corporations whose only contact with Massachusetts consists of soliciting orders for tangible personal property, and delivering such property into the Commonwealth from a point outside Massachusetts in the corporation's private vehicles.

Judgment to enter accordingly.

David M. Roseman
Justice of the Superior Court

DATED: January 3, 1996

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK
THE SUPERIOR COURT

DOCKET # SUCV93-05647H

RE: *National Private Truck Council v Commissioner of Revenue of Massachusetts*

TO: Thomas A. Barnico
Mass Atty General's Office
1 Ashburton Place
Boston MA 02108

NOTICE OF DOCKET ENTRY

You are hereby notified that on 03/10/97 the following entry was made on the above referenced docket:

JUDGMENT: It is Ordered and Adjudged, That Massachusetts regulation 830 Code Mass Regs 63.39.1(5) (1993) violates 15 U.S.C. § 381 (P.L. 86-272) by reducing the scope of tax immunity the federal statute affords to foreign corporations whose only contact with Massachusetts consists of soliciting orders for tangible personal property, and delivering such property into the Commonwealth from a point outside Massachusetts in the corporation's private vehicles; That 830 Code Mass Reg 63.39.1 (5) (1993) as applied to such foreign corporations is hereby declared to be preempted by 15 U.S.C.

§ 381 (P.L. 86-272); and That 15 U.S.C. § 381 (P.L. 86-272) is constitutional. (Roseman, J.) entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d).

Dated: 18th day of March, 1997

Michael Joseph Donovan
Clerk of the Courts

BY:
Francis T Foley, Asst. Clerk
Telephone: 617-725-8217

Supreme Court, U.S.
F I L E D
APR 22 1998
CLERK

No. 97-1570

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Petitioner,

v.

NATIONAL PRIVATE TRUCK COUNCIL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

---

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

RICHARD P. SCHWEITZER *
RICHARD A. ALLEN
SCOTT M. ZIMMERMAN
ZUCKERT, SCOUTT &
RASENBERGER, L.L.P.
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 298-8660
Attorneys for Respondent National Private Truck Council, Inc.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Public Law 86-272 (15 U.S.C. § 381), in which Congress established a threshold level of contacts necessary for states to tax certain transactions in interstate commerce, is consistent with Congress's power to regulate interstate commerce.

PARTIES TO THE PROCEEDING

Petitioner (defendant below) is the Commissioner of Revenue of the Commonwealth of Massachusetts ("Commissioner").

Respondent (plaintiff below) is the National Private Truck Council, Inc. ("NPTC"), a national trade association incorporated under the laws of the Commonwealth of Virginia. NPTC has no parent corporations or non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	5
I. THIS CASE PRESENTS NO CONFLICT FOR THIS COURT TO RESOLVE. COURTS BELOW UNANIMOUSLY HAVE CONCLUDED THAT PUB. L. 86-272 IS CONSTITUTIONAL	5
II. THIS CASE PRESENTS NO SUBSTANTIAL ISSUE WARRANTING THIS COURT'S REVIEW	8
A. Well-established Commerce Clause and Tenth Amendment principles already make clear that Pub. L. 86-272 is constitutional	8
B. This case implicates none of the issues underlying the Court's recent Tenth Amendment or Commerce Clause decisions	11
C. This Court already has strongly and expressly signaled its approval of Congress's enactment of Pub. L. 86-272	13
D. Pub. L. 86-272 is a statute of long standing and only modest impact on the states. It does not unduly interfere with the states' ability to raise revenue, nor permit corporations to avoid paying tax	15
CONCLUSION	18

TABLE OF AUTHORITIES

Cases Page

Arizona v. Atchison, T. & S. F. R.R. Co., 656 F.2d 398 (9th Cir. 1981) 10

Arizona Public Serv. Co. v. Snead, 441 U.S. 141 (1979) 8, 9, 15

Commonwealth of Virginia, Dept. of Taxation v. National Private Truck Council, Inc., 480 S.E.2d 500 (Va. 1997) 4, 5

Deer Park Industrial School Dist. v. Harris County Appraisal Dist., 132 F.3d 1095 (5th Cir. 1998) 9, 10, 13, 17

Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824) 8

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 11

Heublein, Inc. v. South Carolina Tax Comm'n, 409 U.S. 275 (1972) 13, 14, 16, 17

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 8

International Shoe v. Cocreham, 164 So.2d 314 (La.), *cert. denied*, 379 U.S. 902 (1964) 6

McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819) 10

Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954) 14

New Jersey v. Consolidated Rail Corp., 690 F. Supp. 1061 (Sp. Ct. R.R.R.A. 1988) 10

New York v. United States, 505 U.S. 144 (1992) 7, 9, 13

Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994) 11

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) 14

Printz v. United States, —— U.S. ——, 65 U.S.L.W. 4731 (U.S. June 27, 1997) 12, 13

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 14, 15, 16

Southeastern Pennsylvania Transp. Auth. v. Pennsylvania Pub. Util. Comm'n, 826 F. Supp. 1506 (E.D. Pa. 1993), *aff'd without op.*, 27 F.3d 558 (3d Cir. 1994), *cert. denied*, 513 U.S. 928 (1994) 10, 13

TABLE OF AUTHORITIES—Continued

Page

Smith Kline & French Laboratories v. State Tax Comm'n, 403 P.2d 375 (Or. 1965) 6, 7
State Bd. of Ins. v. Todd Shipyards Corp., 370 U.S. 451 (1962) 8, 9
State ex rel. CIBA Pharmaceutical Products, Inc. v. State Tax Comm'n, 382 S.W.2d 645 (Mo. 1964) .. 5, 6
United States v. Lopez, 514 U.S. 549 (1995) 12
United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) 11
Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214 (1992) 13, 14, 16

United States Constitution

Commerce Clause (Art. I, § 8) ..... *passim*
Tenth Amendment ..... *passim*

Federal Statutes

Public Law 86-272 (15 U.S.C. § 381) ..... *passim*
19 U.S.C. § 81*o*(e) 17

Massachusetts Statutes and Regulations

Mass G.L. c.63 § 38(f) 17
830 Code Mass. Regs. 63.39.1(5)(a) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1570

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Petitioner,

v.

NATIONAL PRIVATE TRUCK COUNCIL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

---

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

In this case, NPTC successfully challenged a Massachusetts regulation under which Massachusetts had sought to tax income of non-Massachusetts companies derived from certain transactions in interstate commerce. The trial court held, and the Supreme Judicial Court of Massachusetts affirmed, that the Massachusetts regulation conflicted with, and thus was preempted by, Pub. L. 86-272 (15 U.S.C. § 381). The Commissioner does not seek review of that holding. The courts below also rejected the Commissioner's counterargument that the federal law itself is unconstitutional; the courts held that the statute is valid pursuant to Congress' authority under the Commerce

Clause,[1] and thus is consistent with the Tenth Amendment.[2] It is the constitutional holding alone that is the subject of the Commissioner's petition to this Court. NPTC submits that there is no need for this Court to review the constitutionality of Pub. L. 86-272, and the petition therefore should be denied.

The relevant and material facts were stipulated or undisputed, were properly set out by the court below, and are unchallenged here. NPTC is a national trade association of more than 1,000 companies that manufacture and distribute products and transport their products in their own trucks—that is, trucks that the NPTC member either owns or leases. Pet. A-2.[3] Some NPTC members, not incorporated or based in Massachusetts, regularly solicit sales of tangible goods in Massachusetts. These orders are sent outside Massachusetts for approval, and once approved, the orders are filled from a store of goods outside Massachusetts and the goods are transported from outside Massachusetts to the customer in Massachusetts by the NPTC member using its own trucks. *Id.*

Public Law 86-272, enacted by Congress in 1959, prohibits a state from taxing the income that an out-of-state company earns from the sale of tangible goods in the state if the only contacts with the taxing state "by or on behalf of" the company include "the solicitation of orders

---

[1] "The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several States . . . ." U.S. Const., Art. I, § 8.

[2] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X.

[3] The decisions below of the trial court and the Supreme Judicial Court of Massachusetts are set forth in an appendix to the Commissioner's petition for certiorari. Citations to those decisions in this brief will be to the relevant page of that appendix, as follows: "Pet. A——". Other citations to the Commissioner's petition will be to the relevant page as follows: "Pet. ——".

. . . in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State." 15 U.S.C. § 381.

The Massachusetts regulation challenged by NPTC interpreted and applied Pub. L. 86-272, but in doing so, added a qualification not found in the federal statute: it interpreted Pub. L. 86-272's "shipment or delivery from a point outside the State" to mean "shipment or delivery *by common carrier or contract carrier* from a point outside Massachusetts." 830 Code Mass. Regs. 63.39.1(5)(a) (emphasis added). The regulation thus imposed the Massachusetts tax on companies, like NPTC's members, that solicit sales of tangible goods in Massachusetts and, following approval of those sales outside Massachusetts, deliver the ordered goods into Massachusetts from outside the state in their own trucks.[4]

NPTC filed suit, claiming that the Massachusetts regulation violated Pub. L. 86-272 by limiting the statute's protection to transactions only involving shipment by common or contract carrier, and not delivery by the company itself in its own trucks. The Commissioner argued that the Massachusetts regulation was consistent with Pub. L. 86-272, and that in any event, Pub. L. 86-272 is unconstitutional under the Commerce Clause and the Tenth Amendment.

The case was decided on cross-motions for summary judgment, upon agreed facts. Pet. A-2. The trial court granted summary judgment in favor of NPTC. The court declared that the Massachusetts regulation violates Pub. L. 86-272 "by reducing the scope of tax immunity the federal

---

[4] Transportation of a company's goods by the company itself is known as "private carriage"; private carriage, by definition, is not for-hire. "Common carriage" and "contract carriage" are two types of for-hire transportation; in common and contract carriage, the shipper and the carrier are different entities. Pet. A-2 n.1.

statute affords," and therefore is preempted by the federal statute to the extent the regulation applied to foreign corporations whose only contacts with Massachusetts are the solicitation of sales of tangible goods and the delivery of such ordered goods into Massachusetts from a point outside the state in the company's own trucks. Pet. A-25. The court also declared that Pub. L. 86-272 is constitutional. Pet. A-26.

On direct appellate review, the Supreme Judicial Court of Massachusetts affirmed. Pet. A-2. On the central issue of the Massachusetts regulation's validity under Pub. L. 86-272, the court held that the federal law protects delivery by an out-of-state company in its own trucks, and that the Massachusetts regulation, which failed to recognize that protection, was preempted. Pet. A-4 to A-6. Additionally, the court firmly rejected the Commissioner's claim that Pub. L. 86-272 is unconstitutional. The court held that "Congress enacted [Pub. L. 86-272] pursuant to its power to regulate interstate commerce." Pet. A-7. The statute "sets a uniform minimum standard which must be met before a State may tax interstate commerce. . . . This is clearly within the ambit of Congress's commerce power." Pet. A-8. The court concurrently rejected the Commissioner's Tenth Amendment claim, noting this Court's instruction that "[w]here Congress acts within an enumerated power, such as its authority under the Commerce Clause, the Tenth Amendment is not implicated." Pet. A-7.

In petitioning this Court for a writ of certiorari, the Commissioner expressly has conceded the primary issue in this case, *i.e.*, the invalidity of the Massachusetts regulation under Pub. L. 86-272. He concedes that the decision below, holding that delivery by private carriage is protected under Pub. L. 86-272, is consistent with a decision handed down by the Supreme Court of Virginia in an identical case decided last year. Pet. 9, n.1 (citing *Commonwealth of Virginia, Dept. of Taxation v. National*

Private Truck Council, Inc., 480 S.E.2d 500 (Va. 1997)). The Commissioner, therefore, seeks certiorari only on his secondary claim, also rejected below, that Pub. L. 86-272 itself is unconstitutional. *Id.* For the reasons that follow, the petition should be denied.

REASONS FOR DENYING THE PETITION

I. THIS CASE PRESENTS NO CONFLICT FOR THIS COURT TO RESOLVE. COURTS BELOW UNANIMOUSLY HAVE CONCLUDED THAT PUB. L. 86-272 IS CONSTITUTIONAL.

The petition for certiorari should be denied because there is no dispute among any lower courts as to the constitutionality of Pub. L. 86-272. Shortly after enactment of Pub. L. 86-272, three state supreme courts heard challenges to the constitutionality of the statute on Commerce Clause grounds, and, in two of the cases, specifically on Tenth Amendment grounds as well.[5] These courts unanimously concluded that Pub. L. 86-272 is constitutional. The decision of the Supreme Judicial Court of Massachusetts in this case is fully in accord with these long-established cases. All courts that have considered the question, including the court below in this case, agree that Pub. L. 86-272 is a valid exercise of Congress's Commerce Clause power, and that, consequently, the statute does not violate the Tenth Amendment's reservation to the states of powers not delegated to the federal government. There is, therefore, no conflict of opinion requiring this Court's resolution.

In *State ex rel. CIBA Pharmaceutical Products, Inc. v. State Tax Comm'n*, 382 S.W.2d 645 (Mo. 1964), the Supreme Court of Missouri considered claims that, among

---

[5] The Commissioner's assertion, Pet. 13, that no courts have considered the constitutional claim made in this case, is utterly and demonstrably false. Indeed, the court below, in drawing on two of these earlier cases, expressly noted that those courts "reject[ed] the Tenth Amendment claim raised here." Pet. A-7.

other things, Pub. L. 86-272 exceeded Congress's authority under the Commerce Clause and violated the Tenth Amendment. *Id.* at 654. The court concluded that Pub. L. 86-272 "is in our view a regulation which Congress was authorized to make," and held that the statute was not unconstitutional "on any of the grounds presented." *Id.* at 657.

The same year, the Supreme Court of Louisiana also addressed these same issues in *International Shoe v. Cocreham*, 164 So.2d 314 (La.), *cert. denied*, 379 U.S. 902 (1964). There, the state claimed that Congress exceeded its Commerce Clause power in enacting Pub. L. 86-272, and that the statute "impinges upon the rights reserved to [the states] by the Tenth Amendment." *Id.* at 253. The court flatly rejected Louisiana's claim that Pub. L. 86-272 unconstitutionally impinged upon the state's taxing authority: "Congress, having the power to regulate commerce, has the primary right to consider and determine whether the burden of [Louisiana's] tax adversely affects interstate commerce and, if it finds that it does, to take such measures as it deems effective to suppress it." *Id.* at 262-63. The court thus held that Pub. L. 86-272 was a valid exercise of Congress's Commerce Clause authority and that, insofar as Louisiana's tax laws conflicted with it, the state laws must yield. *Id.* at 266.

In 1965, still another court, the Supreme Court of Oregon, reached the same conclusion. In *Smith Kline & French Laboratories v. State Tax Comm'n*, 403 P.2d 375 (Or. 1965), the court stated that "Congress has the power, under the Commerce Clause, to remove or alleviate state-imposed burdens on interstate commerce," and that in enacting Pub. L. 86-272, "Congress has found it is wise, for the protection of certain business activities from the possible burdens of multistate taxation, to limit state taxation of interstate commerce." *Id.* at 378. The court held that Pub. L. 86-272 did not violate the Commerce Clause:

"Congress now has acted; its statute [Pub. L. 86-272] is contrary to the state [taxing] action; the federal statute is valid and the state statute must yield." *Id.* at 380.[6]

The decision of the Supreme Judicial Court of Massachusetts below fully comports with each of the foregoing cases. The Massachusetts court held that "Congress enacted [Pub. L. 86-272] pursuant to its power to regulate interstate commerce," and that the statute's uniform minimum standard which must be met before a state may tax interstate commerce, is "clearly within the ambit of Congress's commerce power." Pet. A-8. The court therefore rejected the Commissioner's Tenth Amendment claim, drawing on this Court's teaching that "[w]here Congress acts within its enumerated powers, such as its authority under the commerce clause, the Tenth Amendment is not implicated." Pet. A-7 (citing *New York v. United States*, 505 U.S. 144, 156 (1992)).

The decision below is simply the latest in an unbroken line of decisions recognizing the now long-established view that Pub. L. 86-272 is within Congress's authority under the Commerce Clause, and therefore does not infringe any right reserved to the states under the Tenth Amendment. It is unnecessary for this Court to grant certiorari to address this issue.

---

[6] The Oregon court did not specifically discuss the Tenth Amendment, but the conclusion that Pub. L. 86-272 does not violate that amendment necessarily follows from the court's holding that enactment of Pub. L. 86-272 was within the power delegated to Congress under the Commerce Clause. As this Court recently has said, Commerce Clause and Tenth Amendment inquiries "are mirror images of each other," such that, if Congress acts within its authority under the Commerce Clause, the Tenth Amendment, which reserves to the states powers *not* delegated to the federal government, is not violated. *New York v. United States*, 505 U.S. 144, 156 (1992).

II. THIS CASE PRESENTS NO SUBSTANTIAL ISSUE WARRANTING THIS COURT'S REVIEW.

In addition to there being no conflict among lower court opinions requiring resolution by this Court, this case also presents no substantial issue warranting this Court's review. The Court's current Commerce Clause and Tenth Amendment jurisprudence makes clear that—as found by every court to address the matter—Pub. L. 86-272 is constitutional. Additionally, the issues confronting the Court in its recent Commerce Clause and Tenth Amendment cases are not present here, and, as the court below recognized, the scope of the statute in any event is modest.

A. Well-established Commerce Clause and Tenth Amendment principles already make clear that Pub. L. 86-272 is constitutional.

Principles already well-established by this Court and others plainly demonstrate that Pub. L. 86-272 is constitutional, and that the decision below, along with the decisions of the several other courts that have upheld the statute, is correct.

Since the early years of the Republic this Court has recognized Congress's plenary power to regulate interstate commerce. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824); *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451 (1962).

Moreover, it is well established that Congress, consistent with its power to regulate interstate commerce, can preempt entirely the states' regulation of private activity that affects interstate commerce. *See, e.g., Hodel v. Virginia Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981) and cases cited therein. In particular, Congress can prohibit states from imposing taxes found by Congress to interfere with interstate commerce. *See, e.g., Arizona Public Serv. Co. v. Snead*, 441 U.S. 141 (1979). In

Snead, this Court upheld, under the Commerce Clause, a federal statute that invalidated a New Mexico state tax on the generation of electricity, which tax Congress had found interfered with interstate commerce. *Id.* at 150. The Court noted "the broad power of Congress to regulate interstate commerce," and held that Congress "had a rational basis for finding that the New Mexico tax interfered with interstate commerce, and selected a reasonable method to eliminate that interference." *Id.*

With respect to the Tenth Amendment, in cases involving the division of authority between the federal and state governments, this Court has made clear that Commerce Clause and Tenth Amendment inquiries "are mirror images of each other." *New York v. United States*, 505 U.S. 144, 156 (1992). That is, if Congress acts within its authority under the Commerce Clause, the Tenth Amendment is not implicated. *See id.* Thus, "historically, Congressional prohibitions on state taxation have been upheld over Tenth Amendment challenges." *Deer Park Industrial School Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095, 1099 (5th Cir. 1998) (discussing cases).

Applying these principles, numerous courts have upheld against Tenth Amendment challenge other federal statutes limiting the states' taxing authority. Just this year, for example, the Fifth Circuit upheld the constitutionality of a federal statute that exempts from state and local ad valorem property taxes businesses located inside Foreign Trade Zones. *Deer Park Industrial School Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095 (5th Cir. 1998). The court, citing this Court's opinion in *Todd Shipyards*, noted that "the plenary power granted to Congress under the Commerce Clause includes the power to protect interstate and foreign commerce from taxation," and held that Congress's enactment of the statute restricting state and local taxation was "well within its power under the Commerce Clause". *Deer Park*, 132 F.2d at 1099. The court also expressly rejected the school district's Tenth Amend-

ment claim because that amendment does not inhibit the activities of the federal government when the government acts in accordance with a power conferred on it by the Constitution. *Id.*

In *Southeastern Pennsylvania Transp. Auth. v. Pennsylvania Pub. Util. Comm'n*, 826 F. Supp. 1506 (E.D. Pa. 1993), *aff'd without op.*, 27 F.3d 558 (3d Cir. 1994), *cert. denied*, 513 U.S. 928 (1994) *("SEPTA")*, the court upheld a federal statute prohibiting the states from taxing certain commuter rail lines, and rejected a claim that the statute violated the Tenth Amendment. The court held that

> the fact that pre-emptive federal legislation may impinge on a state revenue-raising scheme has no special Tenth Amendment implications. Congress' authority to prohibit state taxation as an incident of the exercise of its delegated powers is well-entrenched—dating back, one might argue, to *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 431, 4 L.Ed. 579 (1819).

Id. at 1520.

Other cases in which courts have upheld, in the face of Tenth Amendment challenges, federal statutes restricting states' taxing power, include *New Jersey v. Consolidated Rail Corp.*, 690 F. Supp. 1061 (Sp. Ct. R.R.R.A. 1988) (rejecting Tenth Amendment challenge to federal statute prohibiting states from taxing Conrail), and *Arizona v. Atchison, Topeka & Santa Fe R.R. Co.*, 656 F.2d 398 (9th Cir. 1981) (rejecting Tenth Amendment challenge to restriction on state taxation in the Railroad Revitalization and Regulatory Reform Act).

The Commissioner attempts to avoid the plain import of these well-established principles by distinguishing Pub. L. 86-272 from other federal statutes restricting state taxation. He argues that Congress's goal in enacting Pub. L. 86-272 was solely to prevent the states from unduly burdening interstate commerce, and that this "undue burden"

rationale is "a far weaker basis for a federal restriction on state taxation than discrimination against interstate commerce or a tax on federal instrumentalities or employees." Pet. 20.

But the Commissioner's unilateral demotion of considerations of "undue burden" to second-class constitutional status is without basis in this Court's (or any court's) decisions. Even assuming, for the sake of argument, that those considerations were Congress's sole basis for enacting Pub. L. 86-272, it has long been fundamental Commerce Clause law that acting to prevent such burdens on interstate commerce is within Congress's purview. *See, e.g., United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 116 (1942) (holding constitutional a federal statute regulating handling of agricultural products that "directly burdens, obstructs, or affects" interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (Congress's power under the Commerce Clause extends to regulation of local activities "which might have a substantial and harmful effect" on interstate commerce); *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 373 (1994) (Congress's principal concern in enacting the Anti-Head Tax Act was to prohibit the states from assessing fees "that unduly burden interstate commerce.").

In sum, well-established Commerce Clause and Tenth Amendment principles already set down by this Court and applied by others show beyond any serious argument that the previously-discussed state court decisions unanimously upholding the constitutionality of Pub. L. 86-272 are correct and consistent with those principles. There is no need for this Court further to address the issue here.

B. This case implicates none of the issues underlying the Court's recent Tenth Amendment or Commerce Clause decisions.

Nor is it necessary to grant certiorari to review Pub. L. 86-272 in light of this Court's recent decisions invalidating

federal statutes on Tenth Amendment or Commerce Clause grounds. Congress's enactment of Pub. L. 86-272 is plainly and substantially different from the congressional actions at issue in those cases.

First, this case is substantially and obviously different from cases in which a federal statute has been struck down because the statute's connection with interstate commerce was too attenuated. *See, e.g., United States v. Lopez,* 514 U.S. 549, 585 (1995) (striking down, as exceeding Congress's Commerce Clause power, a federal statute prohibiting the knowing possession of a gun in a school zone). In this case there is no question that the transactions protected under Pub. L. 86-272 are the very essence of interstate commerce. The statute protects transactions in which sales of goods are solicited in a particular state, the orders are sent outside that state for approval, and, if approved, the ordered goods are shipped or delivered from a point outside the state where the solicitation occurred. It is beyond argument that such multistate transactions involving the sale and transportation of goods are quintessentially interstate commerce. The Commissioner, in fact, openly admits that the transactions Massachusetts seeks to tax, and Pub. L. 86-272 seeks to protect, are interstate commerce. *See* Pet. 5 (describing the transactions covered by the challenged Massachusetts tax regulation, and noting that Pub. L. 86-272 "purports to limit the authority of the States to tax *such interstate commerce*") (emphasis added). There is no reason, therefore, for this Court to grant certiorari for the purpose of making a *Lopez*-like analysis of the activity affected by the federal statute.

Moreover, this case also fundamentally differs from recent cases in which the Court has struck down, on Tenth Amendment grounds, various federal statutes that, in effect, sought to press the states into the regulatory service of the federal government. *See, e.g., Printz v. United States,* —— U.S. ——, 65 U.S.L.W. 4731 (U.S. June 27,

1997) (invalidating a provision of the Brady Handgun Violence Prevention Act compelling local law enforcement officials to conduct background checks of gun purchasers); *New York v. United States*, 505 U.S. 144 (1992) (striking down part of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that forced states either to take title to radioactive waste generated within their borders, or regulate pursuant to Congress's direction). Those cases, too, are significantly different from the present case: unlike the federal statutes struck down in those cases, Pub. L. 86-272 merely limits the states' authority to tax certain transactions in interstate commerce. It plainly does not "'commandeer' state governments into the service of federal regulatory purposes," *New York*, 505 U.S. at 175, or "command . . . state governments to implement legislation enacted by Congress," id. at 176, or "press[] into federal service" local or state officials "in the administration of a federally enacted regulatory scheme," *Printz*, —— U.S. at ——, 65 U.S.L.W. at 4733. Moreover, courts addressing federal limits on state taxation already recognize this important distinction. *See Deer Park*, 132 F.3d at 1099 (distinguishing *New York* and *Printz*); *SEPTA*, 826 F. Supp. at 1519-1520 (distinguishing *New York*). Thus, the Court's recent Tenth Amendment cases provide no reason for the Court to grant certiorari in this case.

C. This Court already has strongly and expressly signaled its approval of Congress's enactment of Pub. L. 86-272.

Although this Court has never directly addressed the constitutionality of Pub. L. 86-272, it has had occasion to analyze and interpret the statute. *See Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992); *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275 (1972). In doing so, the Court has never shown any doubt about the statute's constitutionality. In fact, in a recent and significant case involving state taxation of interstate commerce under the Due Process and Commerce Clauses, this Court endorsed Congress's enact-

ment of Pub. L. 86-272. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 315-16 and n.9. (1992).

In *Heublein*, the Court reviewed the origins of Pub. L. 86-272, noting that it arose from concern that the Court, in the earlier case of *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), had left unclear what local activities by an out-of-state company were enough to create sufficient nexus to allow the state to tax the company. *Heublein*, 409 U.S. at 280. The Court commented that Pub. L. 86-272 "was designed to define clearly a lower limit for the exercise of that power." *Id.*[7] In its discussion, the Court gave not the slightest indication that Congress's enactment of the statute was constitutionally suspect. See *id.* at 279-81. Twenty years later, in *Wrigley*, the Court revisited Pub. L. 86-272 in a case raising the issue of interpretation of the term "solicitation" in the statute. The Court again reviewed the circumstances of the statute's enactment, again noted that the statute was enacted for the purpose of defining a limit to the states' power to tax certain transactions, and again refused to suggest in any way that Congress could not constitutionally do what the Court recognized it had done. *See Wrigley*, 505 U.S. 220-223. That same year, in *Quill*, a case addressing the constitutional limits of nexus standards, the Court noted the benefits of clear, uniform rules pertaining to the boundaries of states' authority with respect to taxation of interstate commerce, and referred ap-

---

[7] The Court's discussion of Pub. L. 86-272's origin makes clear the error in the Commissioner's assertions that the statute prohibits state taxation that "otherwise satisfies the Constitution," Pet. 8, and that is "based on a constitutional nexus between the taxpayer and the taxing State," Pet. 12. As the Court has recognized, Congress enacted Pub. L. 86-272 precisely because the required degree of nexus was *not* clear. *See Heublein*, 409 U.S. at 280 and n.5. Moreover, in a case decided just five years before enactment of Pub. L. 86-272, this Court had found insufficient nexus to permit state taxation even though some goods were delivered in the out-of-state company's own truck. *See Miller Bros. Co. v. Maryland*, 347 U.S. 340, 341 (1954).

provingly to Congress's enactment of Pub. L. 86-272 as an example of such a rule. *See Quill,* 504 U.S. at 316 and n.9.[8] Thus, far from questioning the constitutional validity of Pub. L. 86-272, this Court has held out the statute as an example of the proper role of Congress in allocating tax burdens among interstate commerce, and, while not expressly so ruling, has strongly signaled that, under the test applied in *Snead,* Congress had a "rational basis" for finding that the state taxes proscribed under Pub. L. 86-272 interfered with interstate commerce, and that establishing the uniform standard in Pub. L. 86-272 was "a reasonable method to eliminate that interference." *See Snead,* 441 U.S. at 150.

D. Pub. L. 86-272 is a statute of long standing and only modest impact on the states. It does not unduly interfere with the states' ability to raise revenue, nor permit corporations to avoid paying tax.

Finally, the Commissioner greatly exaggerates the impact of Pub. L. 86-272 on the states, claiming that the statute "goes well beyond" other federal statutes restricting state taxation, Pet. 19, even raising the specter of the federal government unleashing "the right to destroy" the states' very power of taxation. Pet. 14. Hyperbole aside, however, the facts show that Pub. L. 86-272 is quite limited in its scope and impact, and no more intrusive than other federal statutes limiting state taxing authority.

Pub. L. 86-272 has been an integral part of the landscape of federal-state relations for nearly 40 years, since its enactment in 1959, providing a uniform threshold for state taxation of certain transactions in interstate commerce which "encourages settled expectations and, in

[8] The Court's comments in *Quill* also highlight the absurdity of the Commissioner's assertion, Pet. 16, n.3, that Pub. L. 86-272 "*undermines* the fairness and uniformity sought by the States in the application of their tax laws." (emphasis added). The statute plainly does just the opposite.

doing so, fosters investment by businesses and individuals." *See Quill Corp. v. North Dakota*, 504 U.S. 298, 316 & n.9. The Commissioner seeks to overturn longstanding and uniform law upon which all states and interstate companies have come to rely.

Moreover, contrary to the Commissioner's assertion, Pet. 19, that Pub. L. 86-272 "goes well beyond the other federal statutes that restrict state taxation," the actual scope of Pub. L. 86-272 is very limited. The statute affects only taxes on income, and even then, only income derived from the sale of tangible personal property, not services or intangible property.[9]

With respect to taxes that *are* implicated under Pub. L. 86-272, the statute only limits the authority of states to tax those out-of-state companies whose *only* connection with the taxing state are those enumerated in the statute.[10] An out-of-state company is not protected if it engages in activities in the taxing state beyond the very limited contacts that the statute permits. For example, an out-of-state company is not protected under Pub. L. 86-272 if its activities in the taxing state exceed the scope of solicitation, *Wrigley, supra*, or if it maintains a store of goods in the taxing state, *Heublein, supra*.

In proscribing only one specific type of tax applicable to only a limited category of transactions engaged in by a limited class of companies, Pub. L. 86-272 thus is con-

---

[9] It in no way limits Massachusetts' authority to collect *other* taxes related to out-of-state companies' use of Massachusetts' highways or other facilities, such as taxes on the purchase or use of fuel, apportioned registration fees on commercial trucks, or tolls or other highway use taxes. Moreover, the statute does not limit Massachusetts' authority to collect sales and use taxes from persons who purchase or use goods in Massachusetts that are purchased from out-of-state companies covered by the statute.

[10] Or, as this Court has held, activities that are merely ancillary, or *de minimis* exceptions, to those permitted contacts, *see Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992).

ceptually no broader than, for example, the statute upheld in *Deer Park,* which exempts businesses located inside Foreign Trade Zones from state and local ad valorem property taxes. 19 U.S.C. § 81*o*(e). Moreover, this Court has recognized the "rather limited purposes" of Pub. L. 86-272, *see Heublein*, 280 U.S. at 279, and the court below in this case also noted the limited reach of the statute, describing it as a "permissibly small preclusion of State taxing power to protect interstate commerce." Pet. A-8.

In addition, companies whose income is protected under Pub. L. 86-272 from taxation by a particular state generally do not thereby escape state taxation of that income altogether. In other words, the practical effect of Pub. L. 86-272 in most instances is not to determine *whether* the income in question will be taxed, but simply *where*. That is because most states, including Massachusetts, have adopted a "throw back rule" originally drafted by the Multistate Tax Commission. Under this rule, if Pub. L. 86-272 protects a company from a particular state's income tax notwithstanding its sale of goods to a purchaser in that state, the revenues from those sales become taxable instead by the state of *origin* for the purpose of applying the origin state's corporate income tax. *See, e.g.,* Mass. G.L. c. 63 § 38(f). Thus, companies engaged in transactions covered by Pub. L. 86-272 ordinarily do not altogether escape state taxation of that income. Rather, the tax liability for those sales is merely "thrown back" from the destination state (which Pub. L. 86-272 prohibits from taxing the transaction) to the origin state, where the company's contacts will be great enough to subject it to taxation there. Public Law 86-272 does not "destroy" the states' power of taxation, it merely allocates the burden of state taxation of interstate commerce among the several states.

CONCLUSION

The unanimous state court decisions upholding the constitutionality of Pub. L. 86-272, this Court's existing Commerce Clause and Tenth Amendment jurisprudence, this Court's previous expression of approval of Congress' enactment of Pub. L. 86-272, and the limited scope and impact of Pub. L. 86-272, all plainly show that certiorari is not appropriate in this case.

To the extent that the Court may deem it necessary or desirable at some point to explore the outer boundary of Congress's authority under the Commerce Clause to limit state taxation, this case is not the right vehicle for that effort. Wherever that boundary may lie, it is plain that Pub. L. 86-272 does not even approach it, much less breach it.

NPTC respectfully requests, therefore, that the petition for a writ of certiorari be denied.

Respectfully submitted,

RICHARD P. SCHWEITZER *
RICHARD A. ALLEN
SCOTT M. ZIMMERMAN
ZUCKERT, SCOUTT &
RASENBERGER, L.L.P.
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 298-8660
Attorneys for Respondent National Private Truck Council, Inc.

Dated: April 22, 1998

* Counsel of Record